A

FOREST STEEL SDN BHD v. ICONIC GATEWAY SDN BHD & ANOR AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
BADARIAH SAHAMID JCA
ZABARIAH MOHD YUSOF JCA
B NOR BEE ARIFFIN JCA
[CIVIL APPEALS NO: C-02(IM)(NCVC)-1349-07-2017
& C-02(IM)(NCVC)-1348-07-2017]
14 FEBRUARY 2020

C ***CONTRACT:*** *Agreement – Termination – Extraction of natural resources – Parties entered into bauxite sale and purchase contract pending approval of proprietary mining licence by State Authority – No licence to mine bauxite land – Approvals came through after works started with condition for payment for issuance of licence – Appointed miner advanced payments for licence – Contract to mine terminated*
D *with immediate effect on grounds that miner failed to begin first monthly order – Whether mining of land contingent upon issuance of proprietary mining licence – Whether responsibility to obtain licence fell upon miner's shoulders – Whether termination valid and bona fide – Whether order of specific performance of contract ought to be granted*

E The present case concerned a dispute regarding the mining of bauxite belonging to seven land owners in Pahang. The land owners were settlers in lands developed and managed by the Federal Land Development Authority ('FELDA'). For the State of Pahang, mining of bauxite was subject to the provisions of the Mineral Enactment 2001 ('Enactment') and the Pengarah
F Tanah dan Galian ('PTG') Pahang was responsible for the due administration of the Enactment. Insofar as it concerned the FELDA Wilayah Kuantan's areas, FELDA informed the PTG that Inspirasi Gabungan FELDA Wilayah Kuantan Sdn Bhd ('Inspirasi') would be carrying out the extraction of natural resources. Inspirasi appointed Iconic Gateway Sdn Bhd ('Iconic') as its joint
G venture company. The appointment was reduced into an agreement between Inspirasi and Iconic and the latter was given the rights to undertake the works for the exploration, excavation, extraction and sell bauxite from the seven lots of land. Six land owners appointed Iconic to manage their lands and granted Iconic power of attorneys to carry out works and all related matters,
H including applying for necessary permit or license for their lands ('bauxite land'). While two applications were pending approval by the State Authority, Forest Steel Sdn Bhd ('Forest Steel') and Iconic entered into a bauxite sale and purchase contract ('BSPC') for the exclusive supply of 300,000 (+/- 10%) metric tons of unwashed bauxite (300,000 metric tons of bauxite) from the bauxite land by Iconic, as the seller, to Forest Steel, as the
I buyer, until all bauxite of the specified grade has been fully extracted from

it. Pursuant to a letter of appointment ('LA'), Forest Steel was appointed to mine and extract bauxite on the bauxite land and the appointment was confirmed by Inspirasi. When the BSPC and LA were executed on 20 June 2015, there was no licence to mine the bauxite land issued by the PTG. The approvals only came through on 15 September 2015, with several conditions including payment for the issuance of the proprietary mining licence ('PML') for a total sum of RM602,000 (RM301,000 per licence) which must be paid within 60 days from the date of the letter. Iconic sought assistance from Forest Steel to make advance payments of RM602,000 to pay the PTG for the two PMLs. Iconic stated that they did not expect that the State Authority would impose such a financial requirement for the issuance of the licences and they were not financially ready for such payments. Forest Steel then made the payments and the PMLs were issued. However, three days later, Iconic terminated the BSPC and the LA with immediate effect on the grounds that Forest Steel failed to begin the first monthly order of 300,000 metric tons of bauxite within 30 days from 20 June 2015. Forest Steel commenced an action against Iconic, at the High Court, on the grounds that (i) the termination was wrongful and *mala fide*; (ii) at the time the BSPC and LA were executed, or 30 days after, there was no PML issued to enable them to extract and purchase bauxite from the designated sites; (iii) there was no road to collect the bauxite extracted unless the bauxite was transported through the Sime Darby Plantation ('Sime Darby'); (iv) Sime Darby would only approve and/or allow transportation of bauxite through their plantation if valid mining licences were shown to them; (v) before the execution of the BSPC and the LA, Iconic had given an undertaking to Forest Steel that they would obtain mining licences in just a matter of time and that Iconic had requested Forest Steel to commence clearing the trees including oil palm trees for internal access roads and to extract and remove earth and waste from the site lands ('preliminary works'). Iconic had promised to bear the expenses incurred in relation to the preliminary works; and (vi) Forest Steel had purchased heavy machineries and engaged workers to commence the preliminary works in early May 2015 notwithstanding that the BSPC and the LA were only executed on 20 June 2015. Forest Steel further claimed for specific performance of the BSPC and the LA and for the repayment of all monies paid by Forest Steel pursuant to the contracts in the sum of RM5,010,196.21. Iconic counterclaimed for (i) a declaration that the BSPC and the LA were validly terminated; (ii) a permanent injunction to, *inter alia*, prevent Forest Steel from filing any application to the PTG to obtain mining licence as regards the bauxite land and to carry out any exploration, excavation, extraction works and to sell bauxite on and from the lands; (iii) a mandatory order the Forest Steel remove or move out the heavy machineries from the said lands; and (iv) general and special damages. Having found that there was no breach by Forest Steel and the termination

of the BSPC and the LA was wrongful, the High Court (i) allowed part of Forest Steel's claims for special damages; (ii) disallowed Forest Steel's claims for general damages and loss of profit; and (iii) dismissed Iconic's counterclaim. Hence, the present appeals by (i) Iconic and one of its shareholders ('Neoh') ('Appeal No. 1348'); and (ii) Forest Steel ('Appeal No. 1349'). The issues that arose for determination concerned (i) the validity of the termination of the BSPC and the LA; (ii) the preliminary works; (iii) the lifting of the corporate veil; (iv) damages in favour of Forest Steel; (v) takeover or sabotage of Iconic's rights over the mining works by Forest Steel; and (vi) costs.

Held (allowing Appeal No. 1348 in part; and dismissing Appeal No. 1349) Per Nor Bee Ariffin JCA delivering the judgment of the court:

(1) The BSPC and the LA were connected to each other and they formed a single transaction. The BSPC and the LA were simultaneously executed and reference should be made to both to ascertain the intention of the parties in their bargains. The relationship between Forest Steel and Iconic, as encapsulated in the BSPC and the LA, was purely commercial in nature. The common end result intended by the parties in their bargains was that Forest Steel was Iconic's contractor *cum* the buyer of that amount of bauxite they had to mine. It made commercial sense that Forest Steel must first carry out the mining operation pursuant to the LA for the BSPC to take effect. To commence mining operation, there must be in place six valid PMLs approved by the State Authority and issued by the PTG pursuant to s. 81 of the Enactment. Section 158 of the Enactment makes it an offence for any person to conduct mining without a valid licence whether or not any mineral is won and imposes penalty on conviction. (paras 41 & 47-50)

(2) The BSPC and the LA made no provisions on the PMLs. It was obvious as to why the BSPC and the LA were silent on who bore the responsibility to obtain the PML for two reasons, namely: (i) s. 81 of the Enactment only permits the owner of any alienated land to make an application for PML to the State Authority in the prescribed form. As a result, it was made clear under the mining agreement that Iconic's role was to assist the land owners to obtain the licences by paying for all costs and expenses incurred; and (ii) pursuant to their obligations under the mining agreements, Iconic had already submitted two applications for PMLs. Therefore, the irresistible conclusion to be drawn was that Iconic had already assumed the responsibility to obtain the PMLs when the BSPC and the LA were executed. Forest Steel was in no position to procure the PMLs since they were strangers to the mining agreements and the power of attorneys the land owners had granted to Iconic. (paras 52-55)

(3) At the time the BSPC and the LA were executed, or 30 days after, there was no PML issued by the PTG in respect of the bauxite land. It was therefore plain that there was wrongful termination of the BSPC and the LA by Iconic through no fault of Forest Steel. As the mining of the bauxite land was contingent upon the issuance of the PMLs, Iconic had attached undue weight to Forest Steel's failure to begin the first order when they, in the first place, failed to ensure that Forest Steel could legally commence excavating the bauxite. Logic and common sense dictate that there could not be any order to buy when there was nothing to buy. Iconic must not be permitted to put an end to the BSPC and the LA by taking advantage of its own wrong for its inability to ensure the procurement of the PMLs. (paras 56, 58 & 59)

(4) The preliminary works were carried out while waiting for approval and issuance of the PMLs. Forest Steel had not illegally commenced preliminary works without licence. The preliminary works was a clearing preparation works without doing any mining or excavation of bauxite. (paras 93 & 94)

(5) The HCJ erred in her decision that the corporate veil be lifted in the interest of justice on the basis that (i) Neoh had acted alone in terminating the BSPC and the LA without the consent of the directors of Iconic and without any director's resolution to that effect; and (ii) Neoh had wanted to increase the price and was already dealing with the third party which gravely prejudiced Forest Steel. Based on evidence and findings of the HCJ, it was crystal-clear that Forest Steel had not proven that Neoh had committed actual fraud or inequitable or unconscionable conduct amounting to fraud in equity. (para 113)

(6) Iconic's counterclaim was grounded on the alleged collusion and conspiracy to take over or sabotage Iconic's rights to mine the bauxite land. However, Iconic's failure to plead the acts of conspiracy with great particularity to support the case of conspiracy was fatal and Iconic was entitled to rely on the cause of action in conspiracy. Furthermore, the directors who were alleged to have committed the conspiracy were not even made parties to Iconic's counterclaim and they were still the directors of Iconic. (paras 114 & 120)

(7) The burden of proving damages was on Forest Steel. Forest Steel was also under a duty to mitigate their losses. The periods Forest Steel could claim for damages ranged from May to July 2015, May to September 2015 or May 2015 to February 2016. Forest Steel contended that the period that the court should take into account was May 2015 to February 2016. No worker was called to testify on what sort of services was provided for the period post-termination from October 2015 until February 2016 that specifically required their stay at the site project.

When Forest Steel refused to mitigate their losses, they only had themselves to blame for the loss from October 2015 until February 2016. (paras 149, 155, 156 & 159)

(8) Forest Steel was awarded costs of RM50,000 by the HCJ for the trial. Forest Steel was also awarded costs for legal fees in the sum of RM159,240. The sum of RM159,240 must be set aside as Forest Steel did not succeed in their application for the injunctive relief. RM30,000 for the main suit plus costs for the trial of RM50,000 would amount to a double claim. (paras 180 & 182)

Case(s) referred to:

Amalgamated Investment and Property Co Ltd (In liquidation) v. Texas Bank Commerce International [1982] QB 84 ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Ban Chuan Trading Co Sdn Bhd & Ors v. Ng Bak Guan [2003] 4 CLJ 785 CA ***(refd)***

Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Chor Phaik Har & Ors v. Choong Lye Hock Estates Sdn Bhd & Ors [1996] 4 CLJ 141 CA ***(refd)***

CIMB Bank Bhd v. Veeran Ayasamy (Wakil Diri Kepada Letchimi Muthusamy, Si Mati) [2015] 7 CLJ 289 CA ***(refd)***

Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor [2011] 9 CLJ 257 FC ***(refd)***

Davy v. Garrett [1878] 7 Ch D 473 ***(refd)***

Delpuri-Harl Corp JV Sdn Bhd v. Perbadanan Kemajuan Negeri Selangor [2014] 1 LNS 1075 CA ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Giga Engineering & Construction Sdn Bhd v. Yip Chee Seng & Sons Sdn Bhd & Anor [2015] 9 CLJ 537 FC ***(refd)***

Guan Soon Tin Mining Company v Wong Fook Kum [1968] 1 LNS 43 FC ***(refd)***

Iftikar Ahmed Khan v. Perwira Affin Bank Bhd [2018] 1 CLJ 415 FC ***(refd)***

Kabatasan Timber Extraction Company v. Chong Fah Shing [1969] 1 LNS 63 FC ***(refd)***

Kepong Prospecting Ltd & Ors v. Schmidt [1967] 1 LNS 67 PC ***(refd)***

Kwan Chew Holdings Sdn Bhd v. Kwong Yik Bank Bhd [2007] 2 CLJ 127 CA ***(refd)***

Ming Holdings (M) Sdn Bhd v. Syed Azahari Noh Shahabudin & Anor [2010] 6 CLJ 857 FC ***(refd)***

Ong Thye Peng v. Loo Choo Teng & Ors [2008] 1 CLJ 571 FC ***(refd)***

Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***

Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd [1999] 3 CLJ 577 CA ***(refd)***

Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***

Renault SA v. Inokom Corporation Sdn Bhd & Anor And Other Applications [2010] 5 CLJ 32 CA ***(refd)***

Royal British Bank v. Turquand [1856] 119 ER 474 ***(refd)***
Sime UEP Properties Bhd v. Woon Nyoke Lin [2002] 3 CLJ 719 CA ***(refd)***
Solid Investments Ltd v. Alcatel Lucent (Malaysia) Sdn Bhd [2014] 3 CLJ 73 FC ***(refd)***
SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor [2016] 1 CLJ 177 FC ***(refd)***
Su Wee Lip v. Hj Lassim Abdul Rahman [2009] 1 MLJ 580 ***(refd)***
Syarikat Binaan Utara Jaya v. Koperasi Serbaguna Sungai Glugor Bhd [2009] 1 CLJ 786 CA ***(refd)***
Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC ***(refd)***
Thong Guan Co (Pte) Ltd v. Lam Kong Co Ltd (No 2) [1998] 3 CLJ 964 HC ***(refd)***
UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***
Woo Yew Chee v. Yong Yong Hoo [1978] 1 LNS 240 FC ***(refd)***
Yap JH v. Tan Sri Loh Boon Siew & Ors [1991] 3 CLJ 2960; [1991] 4 CLJ (Rep) 243 HC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 74
Evidence Act 1950, s. 92

Other source(s) referred to:
Chitty On Contracts, vol. 2012, 31st edn, p 943
Mallal's Supreme Court Practice, 4th edn, pp 204 to 205

(Civil Appeal No: C-02(IM)(NCVC)-1348-07-2017)
For the appellant - HY Lee, Joseph Ting & Tan Chun Ming; M/s Joseph Ting & Co
For the respondent - Ong Siew Wan; M/s Andrew-David Wong & Ong

(Civil Appeal No: C-02(IM)(NCVC)-1349-07-2017
For the appellant - Ong Siew Wan; M/s Andrew-David Wong & Ong
For the respondent - HY Lee, Joseph Ting & Tan Chun Ming; M/s Joseph Ting & Co

Reported by Najib Tamby

JUDGMENT

Nor Bee Ariffin JCA:

The Appeals

[1] These two appeals No. C-02(NCVC)-1348-07-2017 (Appeal No. 1348) and No. C-02(IM)(NCVC)-1349-07-2017 (Appeal No. 1349) arose from the decision of the learned High Court Judge on 14 June 2017.

[2] In the High Court, the plaintiff (Forest Steel) sued the first defendant (Iconic) and the second defendant (Dato Neoh) who is a shareholder of Iconic, for breach of contract for the termination of the bauxite sale and purchase contract dated 20 June 2015 (BSPC) and the letter of appointment (LA) also dated 20 June 2015 and sought several reliefs.

[3] Iconic resisted the claim and counterclaimed against Forest Steel and one Sam Siew Chong (Sam) who is the managing director of Forest Steel. Iconic sought among others a declaration that the BSPC and the LA was lawfully and validly terminated by a notice dated 21 September 2015.

[4] The learned judge, after a full trial, allowed part of Forest Steel's claims for special damages and disallowed Forest Steel's claims for general damages and loss of profit. The learned judge dismissed Iconic's counterclaim.

[5] Being dissatisfied with the decision of the learned judge in allowing Forest Steel's claim and the damages awarded and dismissing their counterclaim, Iconic and Dato Neoh appealed against the whole decision in Appeal No. 1348.

[6] Dissatisfied with the damages awarded, Forest Steel appealed against part of the decision of the learned judge in Appeal No. 1349.

Background Facts

[7] The dispute between the parties concerned the mining of bauxite on lands belonging to seven landowners of Lots 33301, 33303, 33304, 33286, 33293, 33294 and 33298 in Felda Bukit Goh, Kuantan, Pahang. The landowners are settlers in lands developed and managed by the Federal Land Development Authority (Felda).

[8] For the State of Pahang, mining of bauxite is subject to the provisions of the Mineral Enactment 2001 - Enactment No. 7 of 2001 (Mineral Enactment). The Pengarah Tanah dan Galian Pahang (PTG) is responsible for the due administration of the Mineral Enactment.

[9] Insofar as it concerned the Felda Wilayah Kuantan's areas, Felda informed the PTG that Inspirasi Gabungan Felda Wilayah Kuantan Sdn Bhd (Inspirasi) would be carrying out the extraction of natural resources.

[10] On 11 October 2014, Inspirasi appointed Iconic as its joint venture company (syarikat usahasama). By the appointment, which was subsequently reduced into an agreement between Inspirasi and Iconic on 3 July 2015, Iconic was given the rights to undertake the works for the exploration, excavation, extraction and to sell bauxite from Lots 33301, 33304, 33293, 33294, 33286, 33303 and 33298.

[11] At the material time, Dato Neoh, Chaye Muk Leng (PW2) and Che Kwon Wooi (PW3) were shareholders of Iconic with shareholdings of 80%, 10% and 10%) respectively (shareholders agreement dated 9 April 2015). Dato Neoh's wife subsequently became another shareholder.

[12] The directors of Iconic are PW2, PW3, Gan Wey Kiat (DW1) and Ng Peak Lim. PW3 was in charge of mining operations and documentations including applications for mining licences.

[13] Six landowners appointed Iconic to manage their lands and granted Iconic power of attorneys, all dated 1 April 2015, to carry out works to explore, excavate, extract and sell bauxite and all related matters including applying for necessary permit or license for their lands. They are:

(i) Abdul Jamal bin Ishak for Lot 33303;

(ii) Che Munah binti Yusoff for Lot 33304;

(iii) Husin bin Mamat for Lot 33286;

(iv) Hamid bin Deraman for Lot 33293;

(v) Munah binti Ab Rahman for Lot 33294; and

(vi) Ismail bin Che Lah for Lot 33298.

(the lots are collectively referred to as the bauxite land).

[14] Two landowners who had obtained titles to their lands, namely Ismail bin Che Lah for Lot 33298 (DW3) and Abdul Jamal bin Ishak for Lot 33303 had signed surat akuan authorising bauxite to be extracted from their respective lands and had appointed Inspirasi to undertake the bauxite project.

[15] On 17 April 2015, all six landowners signed separate perjanjian melombong (mining agreements) with Iconic to basically allow Iconic to carry out mining activities on their respective lands.

[16] On 21 May 2015 and 25 May 2015, Iconic submitted to PTG on behalf of DW3 for Lot 33298 and Abdul Jamal bin Ishak for Lot 33303, applications for Lesen Melombong Tuan Punya (Proprietary Mining Licence/PML). Felda Bukit Goh informed the PTG that they had no objection to the applications. There was no application for PML submitted for the other four lots.

[17] While the two applications were pending approval by the State Authority, on 20 June 2015, Forest Steel and Iconic entered into the BSPC and the LA.

[18] The object of the BSPC was for the exclusive supply of 300,000 (+/- 10%) metric tons of unwashed bauxite (300,000 metric tons of bauxite) from the bauxite land by Iconic (as the seller) to Forest Steel (as the buyer) until all bauxite of the specified grade has been fully extracted therefrom. The first monthly order was to begin within 30 days from the date of the BSPC.

[19] Pursuant to the LA, Forest Steel was appointed as the contractor to mine the bauxite land and to produce the quantity of bauxite stipulated in the BSPC.

[20] The appointment of Forest Steel as contractor to mine and extract bauxite on the bauxite land was confirmed by Iconic's joint venture partner Inspirasi *vide* a letter dated 22 June 2015.

[21] It was not disputed that PW2 and PW3 were entrusted with the authority by Iconic to deal with Forest Steel and Sam in relation to the mining project.

[22] It is common ground that as at 20 June 2015 when the BSPC and the LA were executed, there was no licence to mine the bauxite land issued by PTG.

[23] The approvals on the two applications by DW3 and Abdul Jamal bin Ishak only came in *vide* a letter dated 15 September 2015 with several conditions including payment for the issuance of the PMLs for a total sum of RM602,000 (RM301,000 per licence) which must be paid within 60 days from the date of the letter.

[24] By a letter dated 18 September 2015, Iconic sought assistance from Forest Steel to make advance payments of RM602,000 to pay the PTG for the two PMLs. It was stated in the letter that they had never expected the State Authority to impose such a financial requirement for the issue of the licenses and that they were not financially ready for such payments.

[25] Forest Steel made the payments to PW2 on 18 September 2015. Following the payments, PMLs were issued for DW3 and Abdul Jamal bin Ishak dated 29 September 2015.

[26] However, three days after the payments made by Forest Steel and eight days before the issuance of the PMLs, *vide* a letter dated 21 September 2015, Iconic terminated the BSPC and the LA with immediate effect. Iconic alleged that Forest Steel had failed to begin the first monthly order of 300,000 metric tons of bauxite within 30 days from 20 June 2015.

[27] In the statement of claim (SOC), Forest Steel said the termination was wrongful and *mala fide*. Forest Steel said that at the time the BSPC and the LA were executed, or 30 days thereafter, there was no PML issued to enable them to extract and purchase bauxite from the designated sites. In addition, there was no road to collect the bauxite extracted unless the bauxite are transported through Sime Darby Plantation (Sime Darby). Sime Darby would only approve and/or allow transportation of bauxite through their plantation if valid mining licenses were shown to them. Thus, at all material times, they were unable to perform their obligations under the BSPC and the LA.

[28] It was also Forest Steel's pleaded case that before the execution of the BSPA and the LA, Iconic had given an undertaking to Forest Steel that they would obtain mining licences in just a matter of time and that Iconic had requested Forest Steel to commence clearing the trees including oil palm trees for internal access roads and to extract and remove earth and waste from the site lands (preliminary works). Iconic had promised to bear the expenses incurred in relation to the preliminary works.

[29] Premised on the undertaking, Forest Steel said they purchased heavy machineries and engaged workers to commence the preliminary works in early May 2015 notwithstanding that the BSPC and the LA were only executed on 20 June 2015.

[30] Forest steel claimed that since May 2015, they had invested and incurred heavy expenses totalling RM5,010,196.21 as at October 2015 and continuing, in order to mine and extract the bauxite. Forest Steel said that Iconic must pay back the expenses they had incurred.

[31] Forest Steel sought a declaration that the termination was null and void and claimed for specific performance of the BSPC and the LA and for repayment of all monies paid by the plaintiff pursuant to the contracts in the sum of RM5,010,196.21 as at 31 October 2015. The plaintiff made alternative claim for the repayment of RM5,010,196.21 as at 31 October 2015, payment of all monies paid by the plaintiff from 1 November 2015 until the conclusion of this action, general and special damages to be assessed by the court and loss of profit.

[32] Iconic's defences in the statement of defence (SOD) were as follows:

(i) since the execution of the BSPC, Forest Steel had failed to order 300,000 metric tons a month of bauxite as agreed in the BSPC;

(ii) Iconic had never given Forest Steel any undertaking that they would obtain the mining licences. The BSPA and the LA made no mention of such licences;

(iii) Iconic had never requested Forest Steel to commence the preliminary works. Forest steel had carried out the works on their own without approval and knowledge of Iconic;

(iv) Forest Steel had asked for payment of RM1.5 million from Iconic *via* e-mail dated 12 August 2015 for work done and for the maintenance of machineries. The claim was not consistent with cl. 8 of the LA;

(v) there was no progress on the access road made by Forest Steel;

(vi) there was no washing bay;

(vii) Forest Steel was not interested and/or intended to continue with the bauxite mining project and to execute the BSPC. Forest Steel had refused to communicate with Iconic and had failed to attend two meetings arranged by Inspirasi on 4 October 2015 and 13 October 2015;

(viii) the request for advance payment of RM602,000 by PW2 and PW3 was not authorised by Iconic's Board of Director (BOD);

(ix) the advance payment was planned by Forest Steel to discredit Iconic and a *mala fide* attempt to take over or sabotage Iconic's rights to mine the bauxite land. Forest Steel had appointed Ir. Wan Anuar bin Wan Ibrahim (Wan Anuar) to prepare an application for operational mining scheme (OMS report) to operate bauxite mining on Lot 33303 despite the termination of the BSPC and without Iconic in the picture;

(x) on 20 November 2015, Forest Steel's representatives met the landowners without Iconic's knowledge and had induced them to terminate the mining agreements with Iconic. Forest Steel's action was an inducement of breach of contract between Iconic and the landowners while the agreement between Iconic and Inspirasi was still in existence.

[33] In the counterclaim, Iconic claimed:

(a) a declaration that the BSPC and the LA were validly terminated;

(b) a permanent injunction to, among others, prevent Forest Steel and Sam from filing any application to PTG to obtain mining licence as regards the bauxite land and to carry out any exploration, excavation, extraction works and to sell bauxite on and from the said lands;

(c) a mandatory order that Forest Steel remove or move out the heavy machineries from the said lands within seven days from the date of the order;

(d) general and special damages to be assessed against Forest Steel and Sam.

Findings Of The High Court

[34] There were 14 issues to be tried in the court below. As reflected in the grounds of judgment, the learned judge opined that the crux of the matter that must first be determined was whether the BSPC and the LA were wrongly terminated by the notice dated 21 September 2015. The learned judge came to the finding of facts that there was no breach by Forest Steel and that the termination of the BSPC and the LA was wrongful.

Grounds Of Appeal Of Iconic

[35] Forty-five grounds were set out in the memorandum rayuan and memorandum rayuan tambahan. There were some overlapping but essentially they can be grouped under six heads:

(a) the validity of the termination of the BSPC and the LA (paras. 2, 3, 6, 7, 8, 10, 11, 12, 13, 21, 23, 28, 29, 41(a) and 41(b);

(b) preliminary works (paras. 14, 15, 26, 41(c) and 41(d);

(c) the lifting of the corporate veil (paras. 1, 9, 17, 27,);

(d) damages in favour of Forest Steel (paras. 15, 16, 18, 19, 20, 22, 24, 25, 30, 31 and 32);

(e) takeover or sabotage of Iconic's rights over the mining works by Forest Steel (paras. 4, 5, 23, 41(e), 41(f), 41(g) and 41(h));

(f) costs (paras. 42, 43, 44 and 45).

Our Decision

[36] We propose to first deal with Appeal No. 1348 on the issue of liability of Iconic in terminating the BSPC and the LA and Iconic's counterclaim.

The Termination Of The BSPC And The LA

[37] We have carefully considered the findings of the learned judge, the appeal records and the submissions of counsel for the parties. We are of the considered view that the learned judge was not in error in arriving at her decision that the termination of the BSPC and the LA was wrongful.

[38] For ease of reference, the notice of termination is reproduced below:

> Iconic Gateway Sdn Bhd (1055145-K) Iconic Gateway
> B136, Ground & Ist Floor,
> Jalan Dato Wong Ah Jang,
> 25100 Kuantan, Pahang,
> Malaysia.
>
> Date: 21st September 2015
>
> FOREST STEEL SDN BHD
> 88020, 1st Floor, Jalan Teluk Sisek,
> Sri Kuantan Square,
> 25050 Kuantan, Pahang,
> Malaysia.
>
> Dear Sir,
>
> Re: Notice of Termination
> Bauxite Sale and Purchase Contract dated 20th June 2015 – Contract No. FFSB 2015-01 and
> Letter Appointment of Contractor dated 20th June 2015
>
> The above matter refers.

> Please be informed that todate the Seller (Iconic Gateway Sdn Bhd) and the Buyer (Forest Steel Sdn Bhd) have failed to comply with the terms & conditions of the abovesaid Contract & Letter to begin the first monthly order of 300,000 (+/- 10%) metric ton of unwashed bauxite within 30 days from the Contract date.
>
> We had been having the intention to discuss about the way forward for the abovesaid Contract since the progress has been on *status quo*. However, our effort of having been trying to contact Mr. Sam had been met with no success.
>
> Hence, we hereby give your good company this notice of termination which we have the rights to terminate the Contract and the Letter due to both parties' failure to perform the agreed terms and conditions of the same with immediate effect.
>
> We deeply appreciate the support that you have given to us. Hence, we will give the priority to renegotiate a new agreement with your good company within a suitable timeframe and we sincerely welcome the renegotiation of a new contract.
>
> Thank you. Yours faithfully,
> ICONIC GATEWAY SDN BHD (1055145-K)
>
> GAN WEY KIAT
> Director
>
> Cc: Bodi, Chan & Partners Advocate & Solicitors.

[39] It appears from the notice of termination that the sole reason for the termination was Forest Steel's failure to begin the first monthly order of 300,000 metric tons of bauxite within 30 days from 20 June 2015. However, Iconic's amended SOD as alluded to earlier and from the evidence of the witnesses show that the termination was also grounded on other issues such as the progress of internal access road, washing bay, the email dated 21 August 2015, the advance payment of RM602,000 and Forest Steel's failure to communicate with Iconic which gave Iconic reasons to doubt Forest Steel's capability and interest in the mining project. We shall address them all.

[40] It is elementary that in construing a contract, the whole contract has to be considered with reference to its object and the whole of its terms (see *Chitty On Contracts* Vol. 2012, 31st edn at p. 943). In *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 CLJ 177, Zainun Ali FCJ held at p. 197:

> [41] Thus in addition to the above in interpreting the contract, the court must approach it holistically. No term is to be taken or interpreted in isolation. This canon of construction is so long established, it is almost banal. See for instance *Chamber Colliery Ltd v. Twyerould* [1893] [1915] 1 Ch 268 (Note):

> … the application of the well-known (*sic*) rule that a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses; and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation does not do violence to the meaning of which they are naturally susceptible.

[41] The relationship between Forest Steel and Iconic as encapsulated in the BSPC and the LA was purely commercial in nature. It is trite that in commercial contracts, the intention of the parties must be viewed by reference to the surrounding circumstances leading to the execution of the contracts. The court must have regard to the factual matrix forming the background of the transaction to determine the objective aim or purpose of the transaction, and adopt an objective approach (*Syarikat Binaan Utara Jaya (a firm) v. Koperasi Serbaguna Sungai Glugor Bhd* [2009] 1 CLJ 786; [2009] 2 MLJ 546, *Kwan Chew Holdings Sdn Bhd v. Kwong Yik Bank Bhd* [2007] 2 CLJ 127 and *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269).

[42] It is settled law that in commercial contracts, the law favours a commercially sensible construction. In *Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 9 CLJ 257 it was held at p. 269:

> [19] However, in this case upon construing all the four Agreements as a whole we are not persuaded by the argument advanced for the plaintiff. We are of the view that the interpretation preferred by the plaintiff does not make any commercial sense. In *Mannai Investments Ltd v. Eagle Star Life Assurance Co Ltd* [1997] AC 749 it was said that in 'determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them'.

[43] The contractual relationship between the parties in the present case shows the following. Iconic, which was granted the exclusive right to extract bauxite from the bauxite land by Inspirasi, has no experience in bauxite mining. Forest Steel has not only the mining experience (although for bauxite mining, this was their first experience) but also the resources. The appeal records show Forest Steel was owner, among others, of 27 heavy machineries used in mining activities worth millions of Ringgit. Iconic was confident that Forest Steel was able and qualified to be the buyer for the bauxite to be extracted and as their contractor to carry out the mining project.

[44] They negotiated the terms and had their respective obligations clearly laid out in the BSPC and the LA. In gist, the salient terms of the BSPC as agreed by the parties are summarised below:

(i) clause 1 specified the quantity of their contractual dealings. Forest Steel agreed to buy from Iconic a monthly order of 300,000 metric tons of bauxite sourced from the bauxite lands, the first monthly order of which shall begin within 30 days from the date the BSPC, ie, 20 June 2015;

(ii) clauses 2, 3 and 4 of the BSPC make provisions on quality of unwashed bauxite, the price and delivery terms respectively;

(iii) the manner of payment was stipulated in cl. 6;

(iv) clause 7 deals with the provision of machineries by Forest Steel. Forest Steel would provide the necessary machineries and operators to Iconic to mine and excavate the bauxite at the bauxite land and load the same onto the trucks to be sent to the place specified by Iconic at Kuantan Port. A separate agreement would be executed to record the intention of the parties relating to this arrangement.

[45] There was no dispute that the LA was prepared by Forest Steel. The LA incorporated these words – "pursuant to the bauxite sale and purchase agreement ("supply agreement") signed simultaneously with this agreement, You hereby appoint us to act as contractor to mine and excavate bauxite at the six sites specified in the supply agreement, and load the same onto trucks to be arranged by the (*sic*) your company before it is transported to our specified sites in Kuantan Port." The "supply agreement" referred to the BSPC. Iconic had no reservation on the terms and signed the same.

[46] The salient terms of the LA as agreed by the parties are summarised below:

(i) Forest Steel would provide suitable machineries and experienced drivers to mine, dig and excavate bauxite for the monthly production of 300,000 metric tons of bauxite as stated in the BSPC;

(ii) the contract price of Forest Steel's services was RM7.50 per metric ton of bauxite loaded onto the trucks;

(iii) the contract price was inclusive of diesel required on site, maintenance and insurance cover to all machineries and any assets deployed by Forest Steel;

(iv) the contract price was also inclusive of wages and insurance cover (including KWSP and SOCSO) to the experienced drivers provided by Forest Steel. Forest Steel shall provide for the necessary accommodation, food, water and electricity at their costs;

(v) the contract price shall be inclusive of all machineries and manpower for a monthly production of 300,000 metric tons of bauxite as stated in the BSPC. Any out of scope work required other than mine, dig and excavate bauxite, the estimated contract price shall be pre-agreed by both parties.

[47] The BSPC and the LA were simultaneously executed. In cases where several contracts are contemporaneously executed, the Federal Court in *Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor* (*supra*) held that the general rule is that reference should be made to all the deeds to ascertain the intention of the parties.

[48] We are of the considered view that the BSPC and the LA are connected to each other and they form a single transaction. Thus, reference should be made to both to ascertain the intention of the parties in their bargains.

[49] The combined effect of the BSPC and the LA viewed on an objective basis, clearly show that the commercial bargains of the parties was that Forest Steel was to mine the bauxite land for monthly production of 300,000 metric tons of bauxite as stated in the BSPC using all their machineries and workforce. Forest Steel was then to buy the bauxite that they had extracted from the bauxite land. Put shortly, the common end result intended by the parties in their bargains was that Forest Steel was Iconic's contractor *cum* the buyer of that amount of bauxite they had to mine.

[50] It therefore makes commercial sense that Forest Steel must first carry out the mining operation pursuant to the LA for the BSPC to take effect. To commence mining operation, there must be in place six valid PMLs approved by the State Authority and issued by the PTG pursuant to s. 81 of the Mineral Enactment. Section 158 of the Mineral Enactment makes it an offence for any person to conduct mining without a valid licence whether or not any mineral is won and imposes penalty on conviction.

[51] DW1 conceded that there must be licences issued before Forest Steel could mine the bauxite land. PW2 and PW3 had also directed Forest Steel not to commence mining operation until the PMLs were issued.

Who To Procure The PMLs?

[52] The BSPC and the LA made no provision as regards the PMLs. The learned judge said it was the responsibility of Iconic and not Forest Steel. Iconic contended that the learned judge erred as they had never given Forest Steel any undertaking that they would obtain the mining licences.

[53] It is obvious, in our view, as to why the BSPC and the LA were silent on who bear the responsibility to obtain the PML for two reasons. Firstly, s. 81 of the Mineral Enactment only permits the owner of any alienated land to make an application for PML to the State Authority in the prescribed form. As a result, it was made clear under the mining agreements that Iconic's role was to assist the landowners to obtain the licences by paying for all costs and expenses incurred thereof.

[54] Secondly, pursuant to their obligations under the mining agreements, Iconic had already submitted the two applications for PMLs for Lots 33298 and 33303 on 21 May 2015 and 25 May 2015. Thus, the irresistible conclusion to be drawn is that Iconic had already assumed the responsibility to obtain the PMLs when the BSPC and the LA were executed. In evidence, Sam said Forest Steel was assured by Iconic that it was just a matter of time before PMLs would be issued while PW2 and PW3 said that Iconic had not expected that the PTG would take months to issue the PMLs.

[55] Given the aforesaid, we conclude that the learned judge did not err when Her Ladyship held that the obligation to obtain the PMLs rested with Iconic and not Forest Steel. It could never in any case rest with Forest Steel as Forest Steel was in no position to procure the PMLs since they were strangers to the mining agreements and the power of attorneys the landowners had granted to Iconic (see *Kepong Prospecting Ltd & Ors v. Schmidt* [1967] 1 LNS 67; [1968] 1 MLJ 170, *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393).

[56] It was manifestly clear that at the time the BSPC and the LA were executed, or 30 days thereafter, there was no PML issued by the PTG in respect of the bauxite land or even for Lots 33298 and 33303.

[57] Sam evidently had the ability to excavate 300,000 metric ton of bauxite a month to meet the production requirement under the LA with the machineries and the resources his company had. However, without any licence, there was nothing Forest Steel could do to carry out the mining operation.

[58] It is therefore plain that there was wrongful termination of the BSPC and the LA by Iconic through no fault of Forest Steel. As the mining of the bauxite land was contingent upon the issuance of the PMLs, we find that Iconic had attached undue weight to Forest Steel's failure to begin the first order when they, in the first place, had failed to ensure that Forest Steel could legally commence excavating the bauxite. Logic and common sense dictate that there could not be any order to buy when there was nothing to buy.

[59] Iconic must not in our view be permitted to put an end to the BSPC and the LA by taking advantage of its own wrong for its inability to ensure the procurement of the PMLs. In *Woo Yew Chee v. Yong Yong Hoo* [1978] 1 LNS 240; [1979] 1 MLJ 131, His Royal Highness Raja Azlan Shah, the then acting CJ said that it is a universal principle of law that the court would not allow a party to take advantage of its own wrong (see also the Federal Court case of *Ong Thye Peng v. Loo Choo Teng & Ors* [2008] 1 CLJ 571; [2008] 4 MLJ 31, *Su Wee Lip @ Philip Su v. Hj Lassim Abdul Rahman* [2009] 1 MLJ 580, *Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd* [1999] 3 CLJ 577; [1999] 3 MLJ 489).

[60] In the context of the present case, Iconic was not entitled to invoke cl. 9 of the BSPC and cl. 17 of the LA. The two provisions provide that in the event either party shall breach the terms and conditions of the contracts, the other party shall have the rights to terminate and thereafter the contracts shall be treated as null and void and each party shall not have any claims against the other in respect of the same. There was no breach on the part of Forest Steel to justify such recourse.

[61] It was further submitted by learned counsel for Forest Steel that Iconic was also estopped from complaining that Forest Steel did not begin the first order of 300,000 metric tons of bauxite within the stipulated period as time was no longer the essence when Iconic had asked Forest Steel to advance the payment of RM602,000 to be paid to the PTG for the issuance of the PLMs on 18 September 2015. The letter signed by PW3 stated that if Forest Steel was agreeable to make the advance, the said advance would be contra against the contract sum to be paid by Forest Steel to Iconic until the amount was fully settled.

[62] We agree that the doctrine of estoppel has its application here. Taking into account the letter asking for advance payment was dated 18 September 2015, the conduct of Iconic show that they had intended to proceed with the BSPC and the LA well beyond the 30-day period from 20 June 2015. It would be unjust to allow Iconic to go back on that assumption and to renege (see *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank* Bhd [1995] 4 CLJ 283, *Chor Phaik Har & Ors v. Choong Lye Hock Estates Sdn Bhd & Ors* [1996] 4 CLJ 141; [1996] 2 MLJ 206, *Amalgamated Investment and Property Co Ltd (In liquidation) v. Texas Bank Commerce International* [1982] QB 84 at p. 122).

Was The Letter Dated 21 September 2015 A Termination Notice Or Letter Of Termination?

[63] Iconic said that the notice of termination dated 21 September 2015 was not a termination letter but served as a notice because on that day 21 September 2015, their intention was to see Sam, to summon him to discuss the way forward with the BSPC and the LA in light of the issues plaguing their contractual relationship.

[64] We agree with the learned judge that the notice dated 21 September 2015 was to terminate the BSPC with immediate effect (see paras. 64 and 65 of the grounds of judgment). There was nothing in the letter about calling Sam for discussion. The intention to terminate with immediate effect was made in clear language:

> Hence, we hereby give your good company this notice of termination which we have the rights to terminate the Contract and the Letter due to both parties' failure to perform the agreed terms and conditions of the same **with immediate effect**. (emphasis added).

[65] And the letter also stated:

> We deeply appreciate the support that you have given to us. Hence, we will give the priority to renegotiate a new agreement with your good company within a suitable timeframe and we sincerely welcome the renegotiation of a new contract.

The critical question raised here is, why would Iconic welcome a renegotiation of a new contract or give Forest Steel priority to renegotiate a new agreement if the BSPC and the LA were still in existence?

[66] We also find that it was entirely reasonable for the learned judge to conclude that the termination was *mala fide*. It was in evidence that at a meeting attended by PW3 on 17 September 2015, Dato Neoh informed the meeting that the price for bauxite had increased from RM55 to RM58 per metric ton so Sam should likewise increase the price of RM48 per metric ton to RM58. PW3 said that Dato Neoh gave indication about a new contractor but he was at the same time discreet about it.

[67] It was at a meeting on 20 October 2015, after the termination of the BSPC and the LA, that PW3 learnt more about the new contractor. He was Dato Ivan Chee who was present at the meeting and whose company also had a mining project in Bukit Goh and had dealings with Sunway Pyramid. Dato Neoh said Dato Ivan would be their new contractor. Dato Ivan Chee was in fact discussing as to how he was to start the mining project and when to bring in the machineries. PW3 also said that Dato Neoh had asked him to discuss with Sam about selling the mining project to him for RM10 million. PW3's testimonies were not challenged. In cross-examination, Dato Neoh did not deny that he did inform them about the increase in the market price and whether there was any chance to review the price. On this issue, learned judge correctly concluded at para. 72:

> SD2 juga tidak menolak dakwaan bahawa penamatan kontrak juga disebabkan Defendan-Defendan ingin menaikkan harga kontrak dan sedang berurusan dengan Pihak Ketiga. Dalam hal yang demikian, keterangan SP1, SP2 dan SP3 bahawa Defendan-Defendan mempunyai niat jahat untuk menamatkan Kontrak selepas lesen melombong diperolehi adalah tepat.

[68] We shall now turn to consider the other grounds Iconic had relied on to justify the termination of the BSPC and the LA.

On The Advance Payment Of RM602,000

[69] Iconic had, as set-out earlier, disputed the validity of the letter dated 18 September 2015, saying that the request for advance by PW3 was not authorised by their BOD. Iconic repaid the sum along with interests of 6.85% per annum by cheque to Forest Steel *via* a letter dated 11 November 2015

which was received on 16 November 2015. Forest Steel did not accept the refund and returned the cheque through their solicitors' letter dated 17 November 2015.

[70] We had perused the notes of evidence on the request for the advance payments. PW2's evidence during cross-examination show that he and PW3 had requested Dato Neoh to pay but the latter said he did not have the funds and had asked them to request the advance from Forest Steel. PW3 said that as the amount was huge, he had on 17 September 2015 informed Dato Neoh to pay up. He was given the approval to ask for advance by Forest Steel on 17 September 2015. He agreed that there was no resolution from BOD to request for the advance payments to Forest Steel but he averred that he would not have acted without the instruction of Dato Neoh who was the majority shareholder of Iconic. PW3 said he had obtained oral approval from the other directors. DW1 testified that they were not aware and did not authorise the issuance of the letter. DW1 said the amount was substantial and the matter raised was crucial and therefore would require the approval of the BOD. Dato Neoh however said that RM602,000 was not a big amount of money to his company. Dato Neoh and DW1 both maintained that PW2 and PW3 did not mention anything about the letter to Dato Neoh at the meeting in KL on 17 September 2015, although Dato Neoh knew by that date that the PMLs were approved and RM602,000 had to be paid. It was only on 4 October 2015 that he became aware that RM602,000 had been paid.

[71] The learned judge had accepted the evidence of PW2 and PW3 as reliable compared to Dato Neoh. Her Ladyship opined that Dato Neoh was not familiar with the mining project and the mining operation was best left to PW2 and PW3 as seen from the passage below:

> [68] Mahkamah juga merujuk kepada keterangan-keterangan SD2 yang mengesahkan beliau tidak begitu tahu mengenai perniagaan bauksit dan orang utama yang menjalankan perniagaan bauksit dan berurusan dengan SP1 adalah SP2 dan SP3 (rujuk soalan oleh Mahkamah ms 303 Jilid 2) SD1 menjawab soalan dari Mahkamah iaitu: "The main person to run the business is Mr Chaye and Wooi"). Oleh yang demikian orang yang mempunyai pengetahuan penuh mengenai kontrak bertarikh 20 June 2015 adalah SP2 dan SP3. Banyak perkara berkaitan dengan permohonan-permohonan tidak diketahui SD2 kerana ianya diuruskan oleh SP2 dan SP3. Adalah diakui oleh SD2 juga bahawa SD2 hanya bertindak apabila timbulnya isu atau perkara yang tidak boleh diselesaikan. Dalam hal yang demikian keterangan SP2 dan SP3 adalah lebih dipercayai "reliable" berbanding SD2.

[72] The above is the finding of facts by the learned judge who had the advantage of having seen and heard the witnesses and observing their demeanour. We do not think that Her Ladyship was plainly wrong in arriving at her finding and it is not for us to displace her conclusion

(see *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1; *Ming Holdings (M) Sdn Bhd v. Tuan Syed Azahari Noh Shahabudin & Anor* [2010] 6 CLJ 857; [2010] 4 MLJ 577).

[73] We agree with learned counsel for Forest Steel that Forest Steel was entitled to rely on the letter dated 18 September 2015 and their acts bind Iconic based on the rule in *Turquand*'s case (*Royal British Bank v. Turquand* [1856] 119 ER 474. The rule in the *Turquand*'s case is aimed at internal matters, proceedings and affairs of the company which are not within the knowledge of the outsider who can then assume that they have been complied with in full and the outsider is not bound to inquire whether acts of internal management have been regular (see *Pekan Nenas Industries Snd Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793; *Thong Guan Co (Pte) Ltd v. Lam Kong Co Ltd (No 2)* [1998] 3 CLJ 964).

[74] It bears repeating that it was Iconic's pleaded case that PW2 and PW3 were their directors entrusted and given the authority to deal with Forest Steel and to run the bauxite project in this commercial transaction from the inception until 22 October 2015 (which was post termination date). At law, Forest Steel was under no duty to conduct an investigation as to the capacity or power of PW2 and PW3 and are not required to inquire into the internal affairs of Iconic. The dispute or misunderstanding between PW2 and PW3 and other directors of Iconic including Dato Neoh, were all but internal affairs of Iconic that had nothing to do with Forest Steel. Forest Steel was entitled to assume that all matters of internal management and procedure have been complied with.

[75] There is however an exception to the rule in *Turquand*'s case. In *Pekan Nenas Industries Snd Bhd v. Chang Ching Chuen & Ors (supra)* it was held at p. 828:

> The rule in *Turquand*'s case cannot, however, be invoked by an outsider who knows or ought to know that there is an irregularity.
>
> More particularly, outsiders dealing with a company who know that some relevant procedure internal to the company has not been followed cannot invoke the benefit of the indoor management rule. (See, *Howard v. Patent Invory Manufacturing Co* [1888] 38 Ch.D 156). This is an exception to the Rule in *Turquand*'s case and the burden of establishing it lies on the party invoking the exception and in this case that would be the Father and his faction.

[76] The exception has no application to the present case. Despite the allegation that the advance payment of RM602,000 was planned by Forest Steel to discredit Iconic and a *mala fide* attempt to take over or sabatoge Iconic's rights to mine the bauxite land, there was no evidence led to show that Forest Steel knew what had transpired between the directors of Iconic as regard the request for the advance payment. Sam said in his testimony that

Forest Steel agreed to the request for the advance payment as there was already in existence the BSPC and the LA between them. The learned judge did not find anything sinister about the advance payment when she ruled at para. 67 of the ground of decision – "tindakan plaintif membuat bayaran pendahuluan bagi pihak defendan pertama untuk jumlah RM602,000 kepada pihak PTG menunjukkan plaintif ingin mempercepatkan pengeluaran bauksit dari tanah-tanah lot tersebut ...". Factually, it was true then that Forest Steel had been waiting for the approval of the PMLs since May 2015 to commence mining operation. The payment was handled in the manner it should be. The cheques were given by PW2 to DW4 who is the technical officer of Inspirasi on 18 September 2015 to be paid to the PTG. DW4 was the person in Inspirasi who managed the applications for PML. DW4 had paid the cheques to the PTG.

[77] Iconic further contended that the mandatory purchase of bauxite was not conditioned upon immediate delivery of the bauxite or dependent upon the issuance of the PMLs. Learned counsel reasoned that under cl. 1 of the BSPC, the duty to make the first order to purchase was mandatory and that must be done within the 30-day period from 20 June 2015. However, it was not provided under the BSPC that Forest Steel must be able to excavate the bauxite before Forest Steel can make the purchase.

[78] What Iconic was saying in this line of argument was that the BSPC was not subject to the actual mining operation under the LA. Forest Steel must place orders on a monthly basis, beginning 30 days from 20 June 2015 but Iconic can take as long as they wished to make the delivery. The interpretation by Iconic defies logic and certainly and does not make any commercial sense. What Iconic attempted to do was to interpret cl. 1 of the BSPC independently of the LA and isolating the rest of the provisions in the BSPC and the LA. Iconic is not entitled to do so (*SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor*, *supra*; *Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor*, *supra*).

[79] We accept that there was no time frame for the delivery to take place. The BSPC may not have been drafted in its best form but reading the two contracts in entirety, there is no ambiguity whatsoever as to the operation of the two contracts which we had alluded to earlier and we have no intention to repeat what is obvious. We only wish to add the point missed by learned counsel for Iconic. The BSPC and the LA made specific reference to bauxite excavated and sourced from the bauxite land, not just any land. As the obligations of Forest Steel under the LA was to produce on a monthly basis and any failure to do so may attract the invocation of para. 17 whereby it would be open for Iconic to terminate the LA, and as the requirement to purchase by Forest Steel was also on a monthly basis, inevitably, the delivery must have also been intended to be on a monthly basis until the bauxite land has been fully mined.

A **On The Access Road**

[80] Geographically, the bauxite land was situated at the back of Felda Bukit Goh. Paragraph 14 of the amended SOD reads:

> 14. Untuk memasuki Tanah-Tanah tersebut untuk tujuan perlombongan bauksit, Defendan Pertama perlu melintasi tanah kepunyaan FELDA, Sime Darby Plantation dan beberapa tanah milik individu.

[81] Iconic pleaded at para. 70(v) of the amended SOD in reply to Forest Steel's averment as regard the access problem, the following:

> (v) Plaintif telah memberi representasi atau jaminan kepada Defendan pertama bahawa Plaintif berupaya untuk memperolehi laluan masuk ke Tanah-Tanah tersebut menerusi tanah perladangan Sime Darby. Namun demikian, Plaintif sendiri telah gagal untuk mendapatkan kebenaran dari Sime Darby Plantations Bhd. Tambahan, pada setiap masa Plaintif tidak semestinya menggunakan laluan masuk melalui tanah kepunyaan Sime Darby dan terdapat laluan masuk altenatif melalui tempat lain.

[82] The mining agreement made it clear that Iconic was to provide access roads. Clause 4(a) reads:

> 4(a) Pelombong hendaklah dengan perbelanjaan sendiri menyediakan jalan laluan, alat timbangan, pengangkutan, melaksanakan kerja-kerja mengambil, mengalih dan mengangkut Bahan Batuan/ Tanah dari Tanah Tersebut dan segala alat timbangan, pengangkutan dan bahan-bahan yang disediakan oleh Pelombong adalah kepunyaan dan asset Pelombong. Tuan tanah tidak ada apa hak atas alat timbangan, pengangkutan dan bahan-bahan yang disediakan oleh Pelombong.

[83] The BSPC and the LA made it even clearer. Forest Steel was only required to load the bauxite onto the trucks to be arranged by Iconic at the site and Iconic was to deliver the bauxite to the place specified by Forest Steel at Kuantan Port. This pointed to the fact that it was the responsibility of Iconic to procure access road so as to undertake its obligation to transport the bauxite to Forest Steel's designated area at Kuantan Port.

[84] Undoubtedly, Iconic was responsible to provide an access road. PW3 confirmed that Iconic and Inspirasi were responsible to apply for the access road from Sime Darby.

[85] What remained was whether Forest Steel, at the request of Iconic, did render assistance to get approval from Sime Darby for the transportation of bauxite through their plantation as he knew some people there whom he had business contact with. At the trial, Sam testified that he sent an email to Sime Darby on 3 July 2015 and informed DW1 the outcome on 4 July 2015 that Sime Darby would only approve and/or allow transportation of bauxite through their plantation if valid mining licences were shown to them.

[86] Following Sam's letter, Iconic by a letter dated 22 July 2015 to Sime Darby, requested for permission to build a temporary access road. The request was rejected by Sime Darby *vide* a letter dated 21 August 2015 to DW1.

[87] After Iconic failed to obtain permission from Sime Darby, Inspirasi made an attempt to seek permission to build the same *vide* a letter dated 24 August 2015. Once again, Sime Darby declined the request as per their letter dated 24 November 2015.

[88] From the facts narrated above, we find that Iconic's complaint over the lack of responses from Forest Steel with regard to the status on the procurement of access road from Sime Darby to the bauxite lands or blaming Forest Steel for failure to obtain approval for access road, is highly misconceived. Without the PMLs shown to Sime Darby, Iconic very well knew there could not be any progress in getting through Sime Darby's plantation.

Washing Bay

[89] The State Government of Pahang imposed strict requirements on the provision of washing bay due to environmental issues. Washing bay is a site allocated for cleaning lorries that transported bauxite from the bauxite lands, before the lorries leave the site project. The size of a washing bay is the length of a "lori treler panjang". There must be four washing bays to be built as it concerned the mining project in this present case. Iconic had acknowledged their responsibility to prepare and provide the washing bay because this was one of the criteria in Iconic's proposal when applying the PMLs for the landowners. PW3 had borrowed Forest Steel's specifications to present at the meeting of the MMKN (State Executive Council) through Inspirasi on the washing bay.

[90] In the PTG's letter dated 15 September 2015, the approval by the State Authority for the issuance of the PMLs was subject to the provision of washing bay as stipulated in para. 19 of lampiran 1 which reads:

> 19. Pemegang Lesen/pengusaha bertanggungjawab memastikan semua roda-roda kenderaan yang mengangkut bahan-bahan mineral hendaklah DIBERSIHKAN SEBELUM MENINGGALKAN KAWASAN lombong/ Lesen Melombong Tuan Punya/Lesen Mencarigali/Lesen Penjelajahan/ Lesen Mendulang dan SEBELUM BERGERAK DI ATAS LEBUHRAYA/ JALAN RAYA UTAMA.

[91] It is clear from the above that the PTG had imposed the obligation to provide washing bay on the landowner and that obligation had been assumed by Iconic.

A **Preliminary works**

[92] PW2 and PW3 described preliminary works as "Kerja-kerja awal ini termasuklah menebang dan melupuskan kesemua pokok-pokok kelapa sawit yang terdapat dalam lot-lot tanah tersebut. Kerja-kerja awal tersebut juga termasuk pembinaan jalan-jalan konkrit untuk memudahkan kerja-kerja
B perlombongan."

[93] We reject Iconic's argument that Forest Steel had illegally commenced preliminary works without licence. We agreed with learned counsel for Forest Steel that the preliminary works was a clearing and preparation works
C without doing any mining or excavation of bauxite.

[94] It was in evidence that PW2 and PW3 had requested Sam to commence clearing the trees including oil palm trees for internal access roads and to extract and remove earth and waste from the site lands and Iconic agreed and undertook to pay for the expenses incurred in relation to the
D preliminary works. The preliminary works were carried out while waiting for approval and issuance of the PMLs. PW2 and PW3 were not cross-examined on their evidence.

[95] However, Iconic mounted a challenge on their evidence on this basis. There was a material contradiction on the evidence of Forest Steel's
E witnesses and Forest Steel's pleading at para. 13 of the SOC. There was no written evidence that Iconic had ever made any request to Forest Steel to commence preliminary works with expenses to be borne by Iconic, except for the collusion and conspiracy of PW2 and PW3 in court in favour of Forest Steel. As such request was made prior to the execution of the BSPC
F and the LA, the request was thus superseded pursuant to s. 92 of the Evidence Act 1950.

[96] It was further argued by Iconic that if indeed there was request by PW2 and PW3 to commence preliminary works as alleged, the same would have been incorporated into Forest Steel's crafted LA prepared under Forest
G Steel's letterhead and the rate would have been pre-agreed upon before the execution of the BSPC and the LA. Iconic contended that the learned judge had erred in adopting the evidence of PW2 and PW3 without considering that the two had collaborated with Forest Steel.

[97] It is settled law that failure to cross-examine a witness on a crucial part
H of the case will amount to an acceptance of the witness's testimony (*Wong Swee Chin v. PP* [1980] 1 LNS 138). Iconic is deemed to have accepted the evidence of PW2 and PW3 when they failed to cross-examine them on the issue of the preliminary works.

[98] The learned judge accepted the testimonies of Sam, PW2 and PW3 as
I credible *vis-a-vi*s the preliminary works and made the following conclusion of facts:

> [77] SP2 dan SP3 iaitu pengarah-pengarah kepada Defendan Pertama mengesahkan bahawa atas permintaan Defendan Pertama dan Defendan Kedua, Plaintif telah melaksanakan kerja-kerja pembersihan tapak dan pembinaan jalan konkrit untuk memudahkan kerja-kerja pengorekan. SD1 di dalam keterangannya juga bersetuju bahawa kerja-kerja telah dijalankan oleh Plaintif sebelum kontrak ditandatangani dan SD1 telah pergi ke tapak projek sekali seminggu atau sekali dalam 2 minggu. SP2 juga mengesahkan bahawa Defendan Pertama dan Defendan Kedua telah bersetuju untuk membayar balik segala perbelanjaan atas kerja-kerja permulaan tersebut.
>
> [78] Adalah fakta yang tidak "disangkalkan oleh Defendan-Defendan bahawa semua urusan bauksit ini diuruskan oleh SP2 dan SP3 dengan plaintif. Pada setiap masa adalah di dalam pengetahuan dan kebenaran defendan-defendan bahawa SP2 dan SP3 merupakan wakil bertindak bagi pihak kepada defendan Pertama. Oleh itu adalah tidak wajar sekarang Defendan Pertama dan Defendan Kedua mendakwa mereka tiada pengetahuan dengan urusan yang dikendalikan oleh SP2 dan SP3 bagi pihak Defendan Pertama.

[99] There is no reason to disturb the learned judge's findings. DW1 agreed during cross-examination that there was preliminary work done by Forest Steel on the instruction of Iconic and Iconic would pay for the preliminary works if the claim was reasonable. He further said – "Forest Steel should be rewarded for the amount of actual work done and that is what we have always constantly agree with." Thus the argument on the application of s. 92 of the Evidence Act 1950 is obviously irrelevant.

[100] It was not Iconic's pleaded case that the two directors had colluded or conspired with Forest Steel in any manner to the detriment of Iconic. We shall deal with the allegations of collusion and conspiracy in our analysis of Iconic's counterclaim.

Forest Steel's E-mail Dated 12 August 2015

[101] Forest Steel issued the email requesting payment for the preliminary works in the sum of RM1.5 million without first getting approval from Iconic. The email was sent at the suggestion of PW2 and PW3 when Sam was enquiring whether there could be some payment made for preliminary work done for the last few months. The e-mail reads:

> Chai and Ah Wai have mentioned to Mr. Sam that an amount of RM1.5 million will be paid to Forest Steel for the work done so far and the maintenance of the machinery therein, pending the obtaining of the relevant approvals from the respective parties. Mr Sam has requested me to ask your Company as to the timing of such payment. Please advise.

[102] We are of the view that Iconic had placed too much importance on the unsuccessful attempts to reach out to Sam or Forest Steel regarding the request for payment of RM1.5 million. It is preposterous for Iconic to draw

an inference that Forest Steel's uncooperative attitude was indicative of their disinterestedness in continuing with the mining project. The averment that they have lost confidence on the ability of Forest Steel as their contractor and the ability to perform the obligations under the BSPC is nothing but a lame excuse.

[103] Clause 9 of the BSPC and para. 17 of the LA enable the contracts to be terminated on accounts of breaches of the BSPC or failure to comply with the terms of the LA. Lost of confidence on the ability to perform due to non-responsive communication on the part of Forest Steel, was not one of them. In any event, Iconic did not make any payment, Forest Steel did not pursue the matter further and nothing came of it.

[104] The failure by Forest Steel to attend meetings with Inspirasi and Felda were post-termination. With the termination having immediate effect, Sam's stance that there was no reason for him to attend the meetings and to negotiate stands to reason.

Lifting Of Corporate Veil

[105] We note that in paras. 31 to 35 of the SOC, Forest Steel alleged that Dato Neoh was the *alter ego* and directing mind of Iconic and Iconic was the facade for Dato Neoh to perpetrate fraud. It was Dato Neoh that had made the decision to terminate the BSPC and the LA without the knowledge of the other directors and shareholders. Dato Neoh was responsible for the loss suffered by Forest Steel. The court should therefore lift the corporate veil of Iconic. There was however no particulars on the fraud perpetrated by Dato Neoh on Forest Steel.

[106] The learned judge agreed with Forest Steel and Dato Neoh was made jointly liable for Forest Steel's claims for breach of contract. Her Ladyship held:

> [89] Penglibatan Defendan Kedua
>
> Defendan Kedua adalah pemegang saham dan "sleeping partner" di dalam syarikat Defendan Pertama. SP2 dan SP3 yang merupakan pengarah-pengarah Defendan Pertama telah mengesahkan Defendan Pertama secara sendiri telah bertindak diluar peraturan syarikat apabila menamatkan perjanjian tanpa kebenaran dan persetujuan SP2 dan SP3. Defendan Kedua bersetuju di dalam keterangannya bahawa beliau akan memainkan peranannya apabila terdapat masalah berbangkit di dalam syarikat. Defendan Kedua juga tidak menafikan salah satu sebab penamatan adalah pihak Defendan Pertama ingin menaikkan harga kontrak dan menyerahkan projek kepada Pihak Ketiga. Perbuatan Defendan Kedua sangat memperejudiskan Plaintif.

[107] Effectively, when judgment was obtained against Dato Neoh, the learned judge had agreed to the lifting of corporate veil of Iconic. We are of the view that the learned judge had erred in her appreciation of the law. The learned judge ought to have taken into consideration the want of particulars when fraud was alleged by Forest Steel.

[108] It is trite that the particulars of fraud and conspiracy must be pleaded. In *CIMB Bank Bhd v. Veeran Ayasamy (Wakil Diri Kepada Letchimi Muthusamy, Si Mati)* [2015] 7 CLJ 289, the Court of Appeal made observation on the requirement to plead particulars on fraud and adopted the principle in *Davy v. Garrett* [1878] 7 Ch D 473 where Thesiger LJ at p. 489 acknowledged that:

> In the Common Law Courts no rule was more clearly settled than that fraud must be distinctly alleged and as distinctly proved, and that it was not allowable to leave fraud to be inferred from the facts... It may be not necessary in all cases to use the word "fraud"... It appears to me that a Plaintiff is bound to show distinctly that he means to allege fraud. In the present case facts are alleged from which fraud might be inferred, but they are consistent with innocence.

[109] The Court of Appeal also made reference to *Mallal's Supreme Court Practice*, 4th edn where it was stated at pp. 204 to 205:

> Particulars of fraud must be pleaded. A general allegation of fraud, however strong the words used, where there is no statement of circumstances relied on as constituting the alleged fraud, is insufficient even to amount to an averment of fraud of which any court ought to take notice: John Wallingford v. The Directors of the Mutual Society and the Official Liquidator thereof (1879-80) 5 App Case 685 at pp 697, 701 and 709.

[110] Learned counsel for Forest Steel admitted the defects in the pleadings.

[111] Forest Steel is bound by the four corners of their pleadings and cannot be allowed to pursue the alleged claim on fraud. In *Giga Engineering & Construction Sdn Bhd v. Yip Chee Seng & Sons Sdn Bhd & Anor* [2015] 9 CLJ 537, the Federal Court held that the plaintiff is not permitted to improve its pleadings in any other manner other than by way of an application to amend. Otherwise it would be unfair and prejudicial to the defendants if the plaintiff could now be allowed to raise an issue that was not within the contemplation of the parties in the first place. (see also *Iftikar Ahmed Khan v. Perwira Affin Bank Bhd* [2018] 1 CLJ 415).

[112] The Federal Court in *Solid Investments Ltd v. Alcatel Lucent (Malaysia) Sdn Bhd* [2014] 3 CLJ 73; [2014] 3 MLJ 785 at p. 92 (CLJ); p. 803 (MLJ) set out the legal proposition as to when the corporate veil may be lifted:

> [46] We agree with the Court of Appeal that the learned trial judge erred in lifting the corporate veil of the defendant to make the defendant liable to account to the plaintiff. The reason given by the learned trial judge was that it was in the interest of justice to prevent associated companies of

Alcatel Group including the defendant from darting in and out with the corporate labyrinth before the court. We also agree with the Court of Appeal that there must be evidence either of actual fraud or some conduct amounting to fraud in equity to justify the lifting of corporate veil. The position of the law on this subject had been clearly stated by Gopal Sri Ram JCA (as he then was) in *Law Kam Loy v. Boltex Sdn Bhd* [2005] MLJU 225; [2005] 3 CLJ 355 at p. 362 as follows:

> In my judgment, in the light of the more recent authorities such as *Adams v. Cape Industries Plc*, it is not open to the courts to disregard the corporate veil purely on the ground that it is in the interest of justice to do so. It is also my respectful view that the special circumstances to which Lord Keith referred include cases where there is either actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity ...

[113] We are of the considered view that the learned judge erred in her decision that the corporate veil be lifted in the interest of justice on the basis that (a) Dato Neoh had acted alone in terminating the BSPC and the LA without the consent of PW2 and PW3 and without any director's resolution to that effect and (b) Dato Neoh had wanted to increase the price and was already dealing with the third party which gravely prejudiced Forest Steel. From the notes of evidence, and from the findings of the learned judge, it is crystal clear that Forest Steel had not proven that Dato Neoh had committed actual fraud or inequitable or unconscionable conduct amounting to fraud in equity (*Law Kam Loy v. Boltex Sdn Bhd*, *supra*).

The Counterclaim

[114] The counterclaim was grounded on the alleged collusion and conspiracy between PW2, PW3 and Sam to take over or sabotage Iconic's rights to mine the bauxite land. The learned judge dismissed the counterclaim for reasons as stated in paras. 86, 87 and 88 of the grounds of judgment.

[115] The allegations of collusion and conspiracy by the three individuals was basically founded on the following grounds:

(i) the advance payment of RM602,000 (we had already dealt with this issue);

(ii) at the meeting on 18 September 2015 at Sam's office, PW2 and PW3 suggested to DW4 and Zaid bin Sidek (Zaid) who was the managing director of Inspirasi, that Inspirasi appoint Forest Steel in place of Iconic for the mining project;

(iii) the memorandum of agreement (MA) by Forest Steel duly executed by Forest Steel was without Iconic in the picture;

(iv) the OMS report was prepared notwithstanding the termination of the BSPA and the LA and without Iconic in the picture;

(v) Forest Steel's representative met DW4 without Iconic knowledge and had induced him to terminate the mining agreements.

[116] Just as Forest Steel had failed to plead particulars of fraud, so did Iconic with regard to the alleged collusion and conspiracy of Sam, PW2 and PW3.

[117] It is the law that to make out a case of conspiracy, Iconic must establish four elements as laid out in *Yap JH v. Tan Sri Loh Boon Siew & Ors* [1991] 3 CLJ 2960; [1991] 4 CLJ (Rep) 243 where Mohamed Dzaiddin J (as he then was) said at p. 245:

> In order to make out a case of conspiracy, the plaintiff must establish (1) an agreement between two or more persons, (2) an agreement for the purpose of injuring the plaintiff, and (3) that acts done in execution of that agreement resulted in damage to the plaintiff (*Halsbury's Laws of England*, 4 Edn., Vol 45, para 1527). Damage is an essential element and where damage is not pleaded, the statement of claim may be struck out – *Ward v. Lewis* [1955] 1 All ER 55 at p. 56,57. Finally, the acts done which resulted in damage must be without justification or excuse. (*Crofter Harris Tweed Co Ltd v. Veitch* [1942] 1 All ER 142).

[118] The Court of Appeal in *Renault SA v. Inokom Corporation Sdn Bhd & Anor And Other Applications* [2010] 5 CLJ 32; [2010] 5 MLJ 394 adopted the principles in *Yap JH v. Tan Sri Loh Boon Siew & Ors* (*supra*) and made the following observation at p. 49 (CLJ); p. 407 (MLJ):

> [33] It is clear that the very first element to be shown must be an agreement between two or more persons for the purpose of injuring Inokom and Quasar. 'Agreement' is not limited to a signed and sealed agreement but any informal agreement, including a combination of efforts of the alleged co-conspirators. After that, it has to be shown or at least alleged that acts were done in execution of that agreement which resulted in damage to Inokom and Quasar ...

[119] At p. 51 (CLJ); p. 409 (MLJ), the Court of Appeal said that the statement of claim should set forth with clarity and precision the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy:

> [42] There is no allegation of any overt acts carried out by TC Euro in the pleadings and by necessary implication TC Euro had not carried out any overt acts.
>
> The gist of the tort of conspiracy is not the conspirational agreement alone but that agreement plus the overt acts causing damage (*Marrinam v. Vibrart* [1963] 1 QB 234, affirmed; [1963] 1 QB 528).

> Pleading. The Statement of Claim should describe who the several parties are and their relationship with each other. It should allege the agreement between the defendants to conspire, and state precisely what was the purpose or what were the objects of the alleged conspiracy, and it must then proceed to set forth, with clarity and precision, the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy; and lastly, it must allege the injury and damages occasioned to the plaintiff thereby. (The Common Law Library – Number 5 – Precedents Of Pleadings – Section 26 – Conspiracy).

[120] Forest Steel's SOC did not set out any alleged agreement between Sam, PW2 and PW3 to conspire and any overt acts which are alleged to have been done by each of them in pursuance and in furtherance of the conspiracy and the injury and damages occasioned to Iconic. The failure to plead the acts of conspiracy with great particularity to support Iconic's case of conspiracy is fatal and Iconic is not entitled to rely on the cause of action in conspiracy against Sam, PW2 and PW3. We would further add that as PW2 and PW3 were not even made parties to Iconic's counterclaim and the two are still the directors of Iconic, it is inconceivable why Iconic had in the first place embarked on the tort of conspiracy against them.

[121] The failure to sufficiently plead aside, we have carefully scrutinised the notes of evidence and we are of the considered view that the learned judge was correct when making her finding that Iconic and Dato Neoh had failed to prove that Forest Steel had wanted to take over the mining project. For completeness, we shall consider the basis of their contentions.

The Meeting At Sam's Office

[122] DW4 gave evidence that he and Zaid were invited by PW2 and PW3 to attend a meeting with Sam at the latter's office. At the meeting, PW2 and PW3 suggested to DW4 that Inspirasi appointed Forest Steel in place of Iconic for the mining project. DW4 said that he told them that that could not be done because the miner for the bauxite land was Iconic and Forest Steel was the appointed contractor.

[123] The issue raised here is whether there was such a meeting held and if so, on what date? Sam, PW2 and PW3 said there was no such meeting. DW4 insisted that there was meeting but he was not forthcoming as to the date. The notes of evidence show there were altogether five dates mentioned by DW4 for that one meeting, ie, 18 September 2015, 19 September 2015, 21 September 2015, 22 September 2015 and eventually he claimed - "Mesyuarat di pejabat plaintif adalah dalam 19hb pada lingkungan 19 September 2015 - 21hb, dalam lingkungan tarikh ini."

[124] In contrast, in Zaid's affidavit affirmed on 29 December 2015, he said that the meeting took place on 21 September 2015. The inconsistencies as regard the date of the meeting emanated from Inspirasi's officer and managing director whose evidence was heavily relied on by Iconic. Zaid was not called to explain the inconsistencies.

[125] Whichever date given by DW4 and Zaid, a serious doubt is created as it was indisputable that Sam was away from the country from 19 September 2015 until 11 October 2015. There was no reliable and credible evidence to support Iconic's contention that there was a meeting held on 18 September 2015. There is therefore no reason to disbelieve the denials by Sam, PW2 and PW3.

The MA

[126] On 3 October 2015, PW2 and PW3 met DW4 at Kemaman Kopitiam in Kuantan whereby PW2 handed to him the MA which was already signed by Sam. The MA bears no mention of Iconic. At the time the MA was handed over to DW4, the BSPC and the LA were already terminated on 21 September 2015 but PW3 only knew of the termination on 4 October 2015 at a meeting held by Inspirasi at City View Hotel in Kuantan.

[127] Sam admitted that he had signed the MA. The MA according to Sam was prepared by his lawyer, Albert Chooi. Sam said the MA was not meant to take over the mining rights from Iconic but for him to buy insurance coverage to save his machineries from being stolen.

[128] If one is to scrutinise the MA, the purchase of the insurance was not the object of the contract. It was all about the appointment of Forest Steel by Inspirasi as the contractor to mine the bauxite land. However, it was unrefuted that Sam could not read Malay and he signed the MA that was printed for him at 11pm on 18 September 2015 as he was leaving for Singapore on 19 September 2015 on his way to Australia. He was in Australia until 11 October 2015.

[129] Be that as it may, the insurance issue is not totally without basis. The point taken by Forest Steel was that one could not buy insurance coverage unless a licence had been granted as no insurance company would insure illegal mining of bauxite with all the controversies plaguing the issue. PW3 testified that before the PMLs were issued, Sam had asked him whether Inspirasi could issue a letter for him to buy insurance cover. PW3 told him to wait for the PML. Sam agreed that the risk exposed for May and September 2015 was the same but he contended that he could not buy insurance from the time his machineries were brought to the sites in May 2015 because the PMLs were only approved on 15 September 2015. In addition, as he had paid for the licences on 18 September 2015, he wanted to purchase the insurance on 18 September 2015 before he left for Australia. The MA was crafted for that purpose.

[130] PW3 said he did not read the MA as he saw no reason to do so if it was only about purchasing insurance. It was in evidence that when the MA was given to DW4 on 3 October 2015, PW3 did not know then that the BSPC and the LA were terminated. He only knew of the termination at the meeting on 4 October 2015.

[131] It is of importance to note that notwithstanding DW4's evidence that he disagreed with the MA as there was already in existence the BSPC and the LA between Iconic and Forest Steel, and it appeared to him that Forest Steel, PW2 and PW3 had the intention to take over the mining project from Iconic, DW4 had not taken issue with the MA at the meetings with Iconic on 4 October 2015 and also on 13 October 2015. When DW4 had not deemed it fit to mention that they had custody of the MA which envisioned Forest Steel's attempts to rob Iconic's rights, it undermines the credibility of his evidence.

The OMS Report

[132] The issuance of the PMLs for Lot 33303 and Lot 33298 was subject to several conditions wherein one of which was the submissions of operational mining scheme as spelt out at para. 6 of lampiran 1:

> 6. Pemegang Lesen Melombong Tuan Punya hendaklah mengemukakan skim pengendalian melombong bagi kelulusan Pengarah Galian (di Jabatan Mineral dan Geosains Pahang) sebelum bermulanya apa-apa kerja pembangunan atau perlombongan dalam kawasan lesen melombong tuan punya.

[133] This simply means that after the issuance of the PMLs, no mining operation could be undertaken until Jabatan Mineral dan Geosains Pahang (JMG) has approved the OMS for Lots 33303 and 33298.

[134] The undisputed evidence show that PW3 was to attend to the OMS report on behalf of Iconic after the PMLs were approved. He admitted he did not discuss the preparation of the OMS report with DW1 and DW4 because they did not have any experience to deal with the geoscience report. The fees charged by the consultants for the work was somehow high, in the region of RM20,000. He had asked Sam whether the latter knew of any consultant who would not charge as high. Sam agreed to assist. The fees charged for the OMS report by Wan Anuar was RM10,000. Sam paid for the fees.

[135] The objection here is not so much of the making of the OMS report but the fact that the OMS report was prepared in Forest Steel's name and there was no mention whatsoever about Iconic.

[136] PW3 explained that it was in the name Forest Steel because Forest Steel was the contractor and JMG would deal with the contractor when problems arose. That was not challenged. His explanation that even if Iconic

was not mentioned anywhere in the OMS report and even if JMG was to approve the OMS and the OMS would be in the name of Forest Steel, that by itself too would not be prejudicial to Iconic because the OMS was meant for the two lots and Forest Steel was at that material time Iconic's contractor for the said lots. His explanation does not seem to be without basis.

[137] This begs the question, would it make any difference if the termination of the BSPC and the LA was on 21 September 2015 and the OMS report was dated October 2015?

[138] To recapitulate, it was not an issue that PW3 had knowledge of the termination of the BSPC and the LA only at the meeting on 4 October 2015.

[139] PW3 said that on 6 October 2015, he and PW2 took the OMS report to see DW4 and Zaid for two matters, namely to inform them that the OMS report was ready and to resolve the problem of whether they should proceed to submit the OMS report or not since the BSPC and the LA had been terminated on 21 September 2015. He further testified to the following. Without the OMS report to submit to JMS for approval, no mining work could be carried out and there was the charge of RM10,000 to be paid. The OMS report must be given to Zaid as Inspirasi was the penyelaras projek appointed by Felda to manage the bauxite lands. It was entirely up to Inspirasi to decide whether to proceed with the submission or otherwise because they were in control. DW4 and Zaid had accepted the OMS report and kept it with them.

[140] Given the aforesaid and viewed against the backdrop that led to the meeting on 6 October 2015, Iconic's heavy reliance on the evidence of DW4 that PW2 and PW3 had wanted to take over the mining project from Iconic when the OMS report given to him was in the name of Forest Steel, is misplaced.

[141] With the termination of BSPC and the LA, Forest Steel was no longer the contractor for the mining project. The reason for meeting DW4 and Zaid was to ask what was to be done to the OMS report. Inspirasi had to decide what the next step was because the submission to the PTG and JMG was by them. Again, DW4 did not find it fit to inform the meeting on 13 October 2015 that he had received the MA on 3 October 2015 and the OMS report on 6 October 2015 despite his insistence that there were attempts to take over the mining projects by Forest Steel and two of Iconic's directors.

[142] In this case, we are of the considered view that while one ought not to disregard the contents of the MA and the OMS report which patently made no reference to Iconic, the basis for the making of the two documents and the reason for their submission to Inspirasi also ought to be taken into account. The end result would be the evaluation and appreciation of the evidence of the witnesses by the learned judge.

[143] It is well-settled law that an appellate court would be slow to disturb a trial court finding of facts unless the decision is shown to be plainly wrong. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence (*UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785). We are mindful of the fact that the learned judge did not say in so many words the reasons for her finding of facts that the defendants had failed to prove the intention to take over the mining project from Iconic *vis-a-vis* the MA and the OMS report. But we find Her Ladyship's decision was reasonably explained and justified based on the evidence adduced and she had correctly summed up her conclusions – "Mahkamah ini berpendapat penemuan dan dapatan defendan-defendan mengenai niat SP1 untuk merampas projek bauksit defendan pertama hanyalah suatu spekulasi dan andaian semata-mata".

[144] Iconic's letter of termination dated 21 September 2015 and Iconic's letter dated 30 November 2015 did not mention any allegation of take over. We concede with learned counsel for Forest Steel that the allegation of take-over was an afterthought. If there was such collusion or conspiracy to take over, why was Iconic so eager to arrange for meetings with Forest Steel, Sam and Felda and why at these meetings, the take-over or the sabotage was never mentioned?

On Inducement Of Breach Of Contract

[145] DW3 gave evidence that pursuant to the mining agreement, he had received a deposit of RM200,000 from Iconic. On 20 November 2015, PW3 came to his house with a lawyer by the name of Sharif Ridzuan (Ridzuan). PW3 left them without entering DW3's house.

[146] According to DW3, Ridzuan then told him that a civil action was initiated against Iconic and there was injunction order against Iconic whereby Iconic was prohibited from carrying on mining operation. Ridzuan informed him that the mining project of Iconic had failed and there was a probability that the landowners would not reap any benefits from bauxite mining by Iconic. Ridzuan assured him that a new company could carry out mining works fast where the landowners would stand to gain. Ridzuan urged him to terminate the mining agreement. Ridzuan asked him to sign a warrant to act so that he could assist DW3 to find a new company. DW3 signed a warrant to act but withdrew it on 24 November 2015.

[147] Based on DW3's evidence, it is manifestly clear that Iconic's pleaded case that the action by Forest Steel's representative was an inducement of breach of contract between Iconic and DW3, cannot hold water. DW3 had never heard of Forest Steel. He did not know of Forest Steel's appointment as contractor to mine his land. Iconic has not established either Ridzuan or PW3 was Forest Steel's representative.

[148] For the reasons set out above, we find no error by the learned judge in rejecting Iconic's counterclaim.

Damages

[149] The burden of proving damages is on Forest Steel (see *Guan Soon Tin Mining Company v Wong Fook Kum* [1968] 1 LNS 43; [1969] 1 MLJ 99; *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15; *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635; [1989] 3 MLJ 360).

[150] Forest Steel was also under a duty to mitigate their losses. In *Kabatasan Timber Extraction Company v. Chong Fah Shing* [1969] 1 LNS 63; [1969] 2 MLJ 6, the Federal Court held at p. 8 (MLJ):

> The law, however, imposes a duty on every person who suffers damages on account of breach of contract to take reasonable steps to mitigate the damage. In *Anson's Principles of the English Law of Contract*, 22nd Edition, at page 504, the following passage appears:
>
> > It also follows from the rule that damages are compensatory only that one who has suffered loss from a breach of contract must take any reasonable steps that are available to him to mitigate the extent of the damage caused by the breach. He cannot claim to be compensated by the party in default for loss which is really due not to the breach but to his own failure to behave reasonably after the breach.

[151] The learned judge tabulated Forest Steel's damages based on evidence given by Sam in para. 75 of the grounds of judgment as shown below:

	Perkara	Rujuk (ms dalam Ikatan Dokumen)	Jumlah (RM)
1.	Pendahuluan kepada PTG bagi pihak defendan pertama	119, 120-131 (IDB)	602,000.00
2.	Caj pengangkutan masuk dan keluar dari tapak-tapak Bukit Goh	11-154 IDB 347-368, 446-464 IDBT	64,457.00
3.	Bayaran servis dan peralatan ganti untuk jentera-jentera berat kepada Teck Yin Battery	155-158 IDB 339-346 IDBT (Mei-Julai 2015)	3,572.20
4.	Bayaran diesel jentera dan pengangkutan berat dari Mei-Ogos 2015	159-181 IDB 279-319 IDBT	282,178.11
5.	Bayaran upah pekerja dari Mei 2015 – Feb 2016	182-193 IDB 1-170 IDBT	667,539.90

6.	Bayaran pendahuluan Lab Test	194-196 Ms 196 – baucer bayaran dengan cop defendan pertama	4,706.40
7.	Bayaran kepada Sime Darby untuk servis dan alatan ganti jentera berat	197-214 IDB 320-338 IDBT (tempoh 8/6/15 – 28/9/2015)	28,174.90
8.	Bayaran pendahuluan pemasangan paip air	215-217	12,000.00
9.	Bayaran pendahuluan untuk defendan pertama Borang 13D	218-219	4,000.00
10.	Bayaran washing plate kepada Syen Sying Sdn Bhd	220-221 IDB 265-268 IDBT (sept 2015)	21,260.05
11.	Bayaran ansuran kenderaan empat roda yang digunakan untuk membawa individu dan pekerja keluar masuk tapak projek dari Mei 2015 – Feb 2016	481-592 IDBT	182,140.08
12.	Bayaran EPF majikan dari bulan Mei 2015 – Feb 2016	171-211 IDBT Jilid 1	22,886.00
13.	Bayaran Socso	242-248 IDBT Jilid 1	2,953.70
14.	Bayaran pendahuluan pelbagai tujuan termasuk lesen melombong, install pipe dan lab test	249-264	Tiada Sebarang jumlah ditentukan
15.	Bayaran guaman kepada peguam plaintif (Okt 2015 – Feb 2016)	269-275	159,240.00
16.	Bayaran consultation fee kepada Pro C Resources	278 IDBT Jilid 2	10,000.00
17.	Bayaran ansuran jentera berat	593-880	5,885,259.20
	Jumlah		7,952,367.54

[152] In the High Court, Forest Steel had withdrawn their prayer for specific performance. They sought for compensation and damages which include general damages and special damages to be assessed and loss of profit (see submission for Forest Steel at p. 2360 RR 2(20) Bahagian C).

[153] The learned judge's decision as regards the damages at para. 90 of the grounds of judgment is as follows:

	Perkara Tuntutan	Jumlah (RM)
1.	Pendahuluan kepada PTG bagi pihak Defendan Pertama	**602,000.00 (dibenarkan)** (Tidak lagi menjadi isu kerana peguam cara Defendan-Defendan di dalam hujahan mereka telah bersetuju untuk mengembalikan bayaran ini kepada Plaintif)
2.	Caj pengangkutan masuk dan keluar dari tapak projek Bukit Goh	64,457.00 (dibenarkan) P5
3.	Bayaran servis dan peralatan ganti untuk jentera-jentera berat kepada Teck Yin Battery	3,572.20 (dibenarkan) P5
4.	Bayaran diesel jentera dan pengangkutan berat dari Mei-Ogos 2015	282,178.11 (dibenarkan)
5.	Bayaran upah pekerja dari Mei 2015 – Februari 2016	667,539.90 (Dibenarkan setakat bulan Mei 2015 hingga September 2015 sahaja yang berjumlah **RM350,094.55**)
6.	Bayaran pendahuluan Lab Test	4,706.40 (dibenarkan)
7.	Bayaran kepada Sime Darby untuk servis dan alatan ganti jentera berat	28,174.90 (dibenarkan)
8.	Bayaran pendahuluan untuk pemasangan paip air	12,000.00 (dibenarkan)
9.	Bayaran pendahuluan untuk Defendan Pertama Borang 13D	4,000.00 (dibenarkan)
10.	Bayaran washing plate kepada Syen Sying Sdn Bhd	21,260.05 (dibenarkan)
11.	Bayaran ansuran kenderaan empat roda yang digunakan untuk membawa individu dan pekerja keluar masuk tapak projek dari Mei 2015 – Februari 2016	182,140.08 (tidak dibenarkan)
12.	Bayaran EPF majikan dari bulan Mei 2015 – Februari 2016	22,886.00 (ms yang berkaitan adalah seperti di ms 171-191 sahaja) jumlah yang dibenarkan daripada majikan hanya RM21,583.00 sahaja.

13.	Bayaran Socso	2,953.70 (Bulan Jan – Mac 2016 – tiada kaitan dengan tempoh kontrak ditamatkan dan tidak dibenarkan)
14.	Bayaran pendahuluan pelbagai tujuan termasuk lesen melombong, install pipe dan lab test	Tuntutan ini tidak dibenarkan kerana tiada jumlah sebenar ditentukan.
15.	Bayaran guaman kepada peguam Plaintif (Oktober 2015 – Februari 2016)	159,240.00 (Tuntutan berasingan di bawah solicitor & client cost dan dibenarkan menuntut secara biasa melalui taksiran
16.	Bayaran consultation fee kepada Pro C Resources	10,000.00 – dibenarkan
17.	Bayaran ansuran jentera berat	5,885,259.20 (tidak dibenarkan kerana tidak dibuktikan)
	Jumlah Dibenarkan	1,404,026.21 (tidak termasuk perkara 15 yang perlu ditaksirkan)

[154] From the awards made, in Appeal No. 1349, Forest Steel is appealing against the dismissal of the following claims:

(i) wages from October 2015 to February 2016 amounting to RM317,445.35;

(ii) four wheel vehicles instalments of RM182,140.08 for the period of May 2015 to February 2016. These vehicles were used to transport workers to the site project;

(iii) employer EPF for RM22,886 for the period from May 2015 to February 2016;

(iv) SOCSO claim for RM2,953.70;

(v) RM5,885,259.20 for heavy machineries instalments;

(vi) general and special damages to be assessed;

(vii) loss of profit.

[155] In respect of Forest Steel's claims for the period from May 2015 until February 2016, we think it is important at the very outset to determine the period Forest Steel could claim for damages. The period ranged from May to July 2015 or from May to September 2015 or from May 2015 to February 2016.

[156] Learned counsel for Forest Steel contended that the learned judge had fallen into error when the period Her Ladyship had taken into account was from May 2015 until September 2015. The purported termination by Iconic was not accepted by Forest Steel. Forest Steel filed the civil action on

1 November 2015 and had applied for injunctive relief. Thus, to keep the BSPC and the LA "alive", Forest Steel needed to maintain the workers, machineries and equipment at the worksite to avoid itself being in breach of the BSPC and the LA. Forest Steel gave up the mining project only when the injunctive relief was dismissed by the court on 19 February 2016. Thus the period that the court should take into account was May 2015 to February 2016.

[157] Learned counsel for Iconic submitted that as the learned judge had made findings of fact that the preliminary works began in May 2015 and were completed in July 2015 and they were waiting for only the PMLs to be issued, the period should run from May 2015 until July 2015. But erroneously, the learned judge granted Forest Steel damages from May 2015 until September 2015 and not from May 2015 until July 2015.

[158] We do not think the learned judge erred in considering the claim from May 2015 until September 2015. Despite the finding of facts that the preliminary works began in May 2015 and were completed in July 2015, the learned judge had accepted Sam's evidence that clearing works continued, while waiting for the licences to mine, to get rid of wild trees and vegetation that were fast-growing on the land due to weather changes.

[159] Neither did the learned judge err in not allowing the claim to be until February 2016. Sam had made it explicitly clear that upon the termination of the BSPC and the LA, he did not want any negotiation with Iconic or Dato Neoh and that court action would be initiated. Premised on the position taken, there was simply no good reason why Sam should not just leave the site project and why he needed to stay on until the injunction application was determined on 19 February 2016. It is pertinent to highlight that no worker was called to testify on what sort of services was provided for the period post-termination from October 2015 until February 2016 that specifically required their stay at the site project. Sam could have clearly avoided the loss had he not behaved obstinately. When Forest Steel refused to mitigate their losses, they only had themselves to blame for the loss from October 2015 until February 2016 (see *Guan Soon Tin Mining Co v. Wong Fook Kum*, *supra*).

Refund Of RM602,000

[160] This is no longer an issue. Iconic has agreed to make the refund.

Wages

[161] RM350,094.55 was granted by the learned judge. Iconic objected to the award. Learned counsel for Iconic submitted that the amount granted by the learned judge was excessive. The reasons being, taking an example in May 2015:

(i) wages are paid twice a week, at the middle and end of each month;

(ii) pp. 734-735, 736-737, 738-739, 740-741 and 742-743 of the common core bundle (CCB) show wages statements of workers for the months of May, June, July, August and September 2015 respectively:

(a) three workers namely Sam Kok Hong, Heng Aik Meng and Oh Kee Hong were paid RM5,000 each based on 5,000 claim hours. The petty cash vouchers for the wages for the month of May are at pp. 337, 338, 339 of the CCB;

(b) three other workers Ong Thean Choy, Goh Eng Soon and Yeo Chin Kee were paid RM3,000, RM1,500 and RM2,000 respectively for 3,000, 1,500 and 2,000 claim hours. The petty cash vouchers for the wages for the month of May are at pp. 340, 341 and 342 of the CCB;

(iii) foremen Mat Yasin Ali was paid RM1,500 for each payout for 1,500 claim hours;

(iv) other workers were paid very much less based on claim hours.

Learned counsel for Iconic submitted that the claims for 5,000, 3,000, 2,000 or 1,500 working hours were false claims and must be rejected. It was simply impossible for anyone to work for that number of hours in a month.

[162] Learned counsel for Forest Steel submitted that Iconic had never objected to the claims at the trial.

[163] We agreed with learned counsel for Iconic. The claim for 5000 or 3,000 or 2,000 or 1,500 working hours for a fortnight (including 1,500 hours by foreman Mat Yasin Ali) absolutely defies logic and common sense. None of the workers within that category was called to explain how the hours came about. Whether Iconic led any rebuttal evidence is completely irrelevant as the burden of proving lies with Forest Steel (see *Ban Chuan Trading Co Sdn Bhd & Ors v. Ng Bak Guan* [2003] 4 CLJ 785; [2004] 1 MLJ 411). The learned judge ought to have rejected the claims as the same clearly could not be sustained.

[164] It is our judgment that the amount paid to the workers referred to in para. 161(ii) and (iv) above must be deducted from the award of RM350,094.55. The computation is as follows:

(i) the total amount of wages paid:

May 2015 - RM21,500 + RM1,500 + RM22,000 + RM1,500 = RM46,500

June 2015 - RM21,500 + RM1,500 + RM22,000 + RM1500 = RM46,500

July 2015 - RM21,500 + RM1,500 + RM22,000 + 1,500 = RM46,500

August 2015 - RM21,500 + RM1,500 + RM22,000 + RM1,500 = RM46,500

September 2015 - RM22,000 + RM1,500 + RM22,500 + RM1,500 = RM47,500

Total = RM233,500

(ii) amount awarded by the learned judge = RM350,094.55

(iii) RM350,094.55 - RM233,500.00 = RM166,594.55

We vary the award accordingly.

Use Of Diesel

[165] The learned judge allowed the sum of RM282,178.11 from May 2015 to August 2015. Iconic objected to the amount.

[166] Learned counsel for Iconic submitted that going by the number of excavator and lorry drivers working for the period between May 2015 to September 2015 (see pp. 734 - 743 of CCB), it appears that the actual works were carried out only in the month of June where 21-22 workers were listed. There was only one worker for the month of May, six workers for July, three workers for August and one worker for September. Thus the award of RM282,178.11 should not be allowed. There was no worker or person who despatched the diesel called to testify. In addition, learned counsel submitted that the clearing works were only in respect of the two lots, covering an area of approximately 8.063 hectares (19.924 acres) out of the total acreage of the bauxite land which is 24.188 hectares (59.3 acres). Learned counsel submitted this court should only allow 20% of the award made by the learned judge and the sum of RM60,000 was suggested.

[167] We do not agree. As learned counsel for Forest Steel put it, one could not judge the amount of diesel required by the number of workers. We noted that Sam's testimony that he had paid for that amount of diesel used was not challenged during cross-examination (see *Wong Swee Chin v. Public Prosecutor*, *supra*). There were documentary evidence to support Sam's evidence of the payments made. In addition, there was no evidence to show that the preliminary works were only confined to the two lots. We bear in mind that the BSPC and the LA were in respect of the bauxite land. The preliminary works as can be seen from Sam's evidence, were carried out on the bauxite land. Iconic could have, at the trial, put to Sam all the issues raised by learned counsel before us but they chose not to. We affirmed the award made by the learned judge.

Heavy Machineries Instalments

[168] In the SOC, Forest Steel claimed for RM600,000 per month being instalment payments they had paid for 27 heavy machineries they claimed had been used for the clearing works. The claim was from May to October 2015 amounting to RM5,885,259.20.

[169] The learned judge dismissed the claim for reasons as set out in paras. 80 and 81 of the grounds of judgment. We do not think the learned judge had erred in her reasoning.

[170] The learned judge did not allow claims based on Forest Steel's own commitment to the bank's instalments. As Forest Steel had been paying the instalment payments as early as January 2013 and 2014 and already had those machineries with them much earlier than the execution of the BSPC and the LA, Forest Steel needs to pay the bank instalments anyway, regardless of whether the project commenced or otherwise. The instalment payments for the heavy machineries are substantial. To cite a few, the monthly instalment of Off-Highway Truck -740 B was RM41,381.25 per unit (there were four units), Articulated Truck was RM41,493.73 per unit (there were four units), Hydraulic Excavator was between RM4,303.06 lowest and RM17,206.08 the highest and there were altogether eight units. What Forest Steel should have done was to produce evidence of rental rates prevailing then for the use of those heavy machineries, to mitigate their losses.

[171] We now come to the crucial issue. Were the entire 27 heavy machineries deployed and transported to the worksite to do the preliminary works? No witness manning the site project, including those who claimed to have worked for between 5,000 to 1,500 hours, gave evidence. No excavation drivers were called to testify as to the number of heavy machineries that were used during the period between May and September 2015.

[172] Sam said that although his machineries could be used in other mining areas but he had for the purposes of the BSPC and the LA, since May 2015 utilised these machineries solely for the mining project with Iconic as he had undertaken to excavate and extract 300,000 metric tons of bauxite a month. We accept that would be true if the heavy machineries were mobilised for the mining activities. But what we are concerned here is with the preliminary works. Did the preliminary works which according to PW2 and PW3 involved – "Kerja-kerja awal ini termasuklah menebang dan melupuskan kesemua pokok-pokok kelapa sawit yang terdapat dalam lot-lot tanah tersebut. Kerja-kerja awal tersebut juga termasuk pembinaan jalan-jalan konkrit untuk memudahkan kerja-kerja perlombongan." – require eight Hydraulic Excavators, four Off-Highway Trucks and so forth?

[173] To recapitulate, the preliminary works begun in May 2015 and were completed in July 2015. After that, it was a matter of maintaining the site project from growth and wild plants. Logically speaking, the initial stage may require more heavy machineries - but certainly not all heavy machineries that Sam had stationed at the site project waiting to come in for mining activities – and the subsequent stage would require less. Forest Steel would have, whether the BSPC and the LA was terminated or not, maintained records as to the number of heavy machineries they had utilised for the preliminary works. There was however no record to substantiate their claims.

[174] Further, it is significant to highlight that Forest Steel had, as at 12 August 2015, *vide* the email from Heng, asked for a payment of RM1.5 million for work done and maintenance of machineries. As at that date, Forest Steel did not ask Iconic to pay for the instalment payments of the machineries as going by the document, the amount of instalment payments by August 2015 alone was RM2.4 million.

Four Wheel Vehicles Instalment Payments

[175] Forest Steel's claim for RM182,140.08 was dismissed for the same reasons as the dismissal of their claims for heavy machineries instalment payments. This was as set out in paras. 80 and 81 of the grounds of judgment. Similarly, we affirm the decision of the learned judge. The learned judge correctly observed that the instalment payments for vehicle WWY 6627 registered on 28 June 2012 were fully paid on 24 July 2015. All the more reason why Forest Steel ought to present before the learned judge evidence of rental rates for the vehicles.

Employer EPF Contribution

[176] At the hearing of these appeals, learned counsel for Iconic conceded to the award made by the learned judge for RM21,583.00. Forest Steel's claim for the EPF until February 2016 is not allowed for the reasons we had alluded to earlier.

SOCSO

[177] The claim for RM2,953.70 was dismissed because this claim for January to March 2016 had no relation to the contract period as the BSPC and the LA had been terminated. Both counsel did not submit on this issue. We affirmed the decision.

Consultant Fees To Pro C Resources

[178] This is payment for OMS report prepared by Wan Anuar. Learned counsel for Iconic submitted that the OMS report was prepared for Forest Steel's own use and Iconic should not be made to pay for it.

[179] We had already dealt with the preparation of the OMS report. It is incorrect to say that the OMS report was prepared at the instance of Forest Steel. The learned judge was correct in allowing this claim.

Costs

[180] Forest Steel was awarded cost of RM50,000 by the learned judge for the trial. Forest Steel was also awarded cost for legal fees to Forest Steel's solicitors on a solicitor–client basis in the sum of RM159,240. Learned counsel for Iconic submitted that the sum of RM159,240 was a double cost and must not be allowed. Learned counsel for Forest Steel was candid enough to concede on either one of the costs.

[181] We noted that the sum of RM159,240 comprised of Forest Steel's solicitors' invoices at pp. 699 and 700 of the CCB for RM47,700 and RM111,540 respectively. The invoice for RM111,540 relates to the injunction proceedings and so was part of invoice for RM47,700 (RM30,000 was deposit for the main suit and RM15,000 for the injunction).

[182] All in all, the learned judge had granted RM129,240 (RM115,540 + RM15,000 + 2,700) for injunction on solicitor-client basis which application had been dismissed by Her Ladyship on 19 February 2016. We agreed with learned counsel for Iconic that the sum of RM159,240 must be set aside as Forest Steel did not succeed in their application for the injunctive relief. RM30,000 for the main suit plus costs for the trial of RM50,000 would amount to a double claim.

General Damages And Loss Of Profit

[183] The consequences of a breach of contract are governed by s. 74 of the Contracts Act 1950. The learned judge dismissed both claims. The grounds of judgment was silent as regards the claim for general damages but the reason for disallowing the loss of profit is stated in para. 85.

[184] It was submitted for Iconic that this head of claim by Forest Steel ought to be rejected as Forest Steel had failed to make an election either to claim for the loss of profit or for wasted expenditure. Reliance was made on the Court of Appeal's decision in *Delpuri-Harl Corp JV Sdn Bhd v. Perbadanan Kemajuan Negeri Selangor* [2014] 1 LNS 1075; [2015] 2 MLJ 24.

[185] Forest Steel submitted that there was no need to make any election because there were altogether three separate contracts between the parties, namely the contract to carry out the preliminary works, the BSPC and the LA. The damages awarded by the learned judge was in respect of the contract to carry out the preliminary works that were done while the claim for general damages was in respect of the LA and the loss of profit was in respect of the BSPC. Thus the case of *Delpuri-Harl Corp JV Sdn Bhd* has no application since Forest Steel was not making a claim for wasted expenditure and loss of profit

in the same contract. Learned counsel however, did not cite any case law authority to support his contention that only in a situation when there is overlapping of claims that one must do the election.

[186] A perusal of the appeal records show that the issue on election was raised for the first time by Iconic in the High Court at the submission stage, in their submission in reply. Forest Steel did not endeavour to seek leave from the learned judge to specifically reply to this legal argument. The learned judge too did not make any finding pertaining to this issue.

[187] The authorities are very clear as regard the application of the principles of election. The Court of Appeal in *Delpuri-Harl Corp JV Sdn Bhd* (*supra*) said:

> [41] It is also trite that in the event of a breach of contract by a defaulting party, the claimant may either claim for his loss of profits or for his wasted expenditure. However, the claimant must elect either of them and cannot claim for both. In *Anglia Television Ltd v. Reed* [1971] 3 All ER 690, Lord Denning MR in his judgments said:
>
> > … It seems to me that a plaintiff in such a case as this had an election: he can either claim for his loss of profits; or for his wasted expenditure. But he must elect between them. He cannot claim both. If he has not suffered any loss of profits – or if he cannot what his profits would have been – he can claim in the alternative the expenditure which has been thrown away, that is; wasted by reason of the breach. That is shown by *Cullinane v. British 'Rema' Manufacturing Ltd Co* [1953] 2 All ER 126112641265;; [1954] 1 QB 292, at 303, 308.
>
> The above passage was followed with approval in *Ismail v. Haji Taib* [1972] 1 MLJ 259 (FC) (per Suffian FJ), as he then was) and recently in the Court of Appeal decision in *National Land Finance Co-Operative Society Ltd v Westingmont Holdings Sdn Bhd* [2014] 1 AMCR 485 at p. 499 (see also the Court of Appeal decision in *Ban Chuan Trading Co Sdn Bhd v. Ng Bak Guan* [2004] 1 MLJ 411; [2004] 1 AMR 81).

[188] It is pertinent to highlight that the Court of Appeal in *Delpuri-Harl Corp JV Sdn Bhd* (*supra*) read through the amended statement of claim to see whether an election was made. The court considered the appellant's case as a whole and concluded that the appellant had wholly failed to elect to claim for either the loss of profits or for wasted expenditure only and ruled as follows:

> [41] Without an election being made by the appellant, it did not behove the court to consider the appellant's claim as a claim for loss of profits only while excluding the claim for wasted expenditure or *vice versa* to consider the appellant's claim as a claim for wasted expenditure only while excluding the claim for loss of profits. As the law requires the appellant to make an election and as the appellant had failed to do, this in our view had rendered the appellant's claim uncertain to stay the least. It was not for the court to make an election on behalf of the appellant.

[189] In *Ban Chuan Trading Co Sdn Bhd* (*supra*), the court perused the record of appeal but could not find any election made by the respondent. The court held that it could not have been made before the SAR because it is clear from the notes that the respondent insisted on both damages be paid to him. It could also not be made before the learned judge because nothing was mentioned about the election in the judge's judgment.

[190] It is clear from Forest Steel's SOC that there was no election made in the SOC, neither was there any election made before the learned judge. Be that the case, we do not think the fact that Forest Steel had not made the election is of any consequence because it is our considered view that the learned judge was not in error when she held that Forest Steel had failed to prove their claims for loss of profits.

[191] In *Sime UEP Properties Bhd v. Woon Nyoke Lin* [2002] 3 CLJ 719 the respondent made an application to rent Kiosk No. 3 at Subang Parade, a premise which is owned by the appellant. The respondent wanted to sell doughnuts. The respondent sued the appellant for breach of contract when she was not allowed to rent the kiosk and claimed for damages. To show that she had suffered damages, she presented a projection of sale of doughnuts at Subang Parade. The Court of Appeal found that the projection of sale was not reliable and satisfactory to show the damages. At p. 740 the court held as follows:

> It is clear from the authorities that in order to succeed in claims for damages for loss of profit one must establish the actual losses one would have suffered as a result of the breach. A projection as in this case is not sufficient to necessarily mean that one can make a profit out of it because there are instances where people suffer losses. Not all businesses end up with a profit. It is clear that the respondent failed to establish the expected losses as a result of the breach.

[192] In the present case, Her Ladyship opined that Forest Steel should not be entitled to the loss of profit as the excavation and the extraction of bauxite had not commenced due to non-obtainable of PMLs and as a result, the monthly production of bauxite had not materialised and the production of bauxite could not be ascertained. They could only claim for the damages suffered arising from the preliminary works. Her Ladyship had rejected the report dated 20 March 2016 (2016 report) as it was only an estimation.

[193] Despite committing to buy 300,000 metric ton per month, the capacity to mine and extract the bauxite by Forest Steel is doubtful. To recapitulate, the excavation and extraction of 300,000 metric ton per month was to be sourced only from the bauxite land. Given the fact that mining operation is now reduced to an area of 8.063 hectares (19.924 acres) only and it is still unclear as to when the rest of the landowners would obtain their PMLs since they were still without titles to their lots, pure logic would

dictate that even the monthly production of 300,000 metric ton bauxite per month would not in all likelihood be achievable. The 2016 report which Forest Steel attempted to rely on to prove loss of profit relates to the claims on special damages for the preliminary works. We observed that the learned judge did not have the benefit of any computations as to the profits Forest Steel would fetch from the BSPC and the LA. The evidence is completely silent as to what damage Forest Steel has suffered by reason of the termination of the BSPC and the LA despite the claim that in view of the large volume of bauxite to be extracted every month, Forest Steel had to stop all other works and projects in order to concentrate just on this mining project. There was no evidence whatsoever as to what were the works and projects that they had to forsake. In the absence of any such evidence, Forest Steel's claim for loss of profit is purely speculative. Thus the learned judge had correctly approached the measure of damages on the basis of wasted expenditure for the preliminary works only and rejected the claim for general damages and loss of profit.

[194] We should mention here that except for the issues raised before us, learned counsel did not argue on the correctness of the other awards.

Conclusion

[195] Our decision in respect of these appeals are as follows:

(i) we allow Appeal No. 1348 in part:

  (a) by setting aside the order of the High Court that Dato Neoh should be held personally liable for the claims by Forest Steel;

  (b) by varying the order of the High Court with respect to the wages. We substitute the award of RM350,094.55 with the award of RM166,594.55;

  (c) by setting aside RM159,240 cost on a solicitor-client basis; and

  (d) save for the above, we affirm all the orders made by the High Court;

(ii) we dismissed Appeal No. 1349;

(iii) we order Forest Steel to pay Iconic costs of RM10,000 for Appeal No. 1348 and RM30,000 for Appeal No. 1349. The costs are subject to payment of allocator;

(iv) we order the deposits to be refunded to the respective parties.